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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. —

UNITED STATES OF AMERICA, APPELLANT

v.

BERNARD MERSKY, IRVING WEINSTEIN, AND MERSON MUSICAL PRODUCTS CORP.

ON CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES REGARDING JURISDICTION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 22–28) to the effect that it did not have jurisdiction over the appeal is reported at 261 F. 2d 40. It is set forth in the Appendix, *infra*, pp. 20–26. The opinion of the District Court dismissing the information (R. 12–15) is not reported. It is set forth in the Appendix, *infra*, pp. 26–29.

JURISDICTION

On March 26, 1958, the District Court dismissed the information on the ground that a Treasury Decision requiring articles imported from Eastern Germany to

be marked "Germany [Soviet occupied]" did not require such marking for the purpose of 19 U.S.C. 1304. On appeal by the government, the Court of Appeals concluded that the appeal should have been taken to this Court in the first instance, since, in its view, the construction of the Treasury regulations was a construction of a statute under 18 U.S.C. 3731 and, in any event, the order sustaining the motion to dismiss was an order sustaining a motion in bar. App., *infra*, pp. 23–25. It therefore certified the appeal to this Court (R. 29a, 36a, App., *infra*, p. 26). It is the government's position that the case was correctly appealed to the Court of Appeals under 18 U.S.C. 3731, and that the appeal should not have been certified to this Court.

STATUTES, ADMINISTRATIVE REGULATION, AND TREASURY DECISIONS INVOLVED

1. 18 U.S.C. 3731 provides in part:

> An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:
>
> From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.
>
> * * * * *
>
> From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.
>
> * * * * *

If an appeal shall be taken pursuant to this section to any court of appeals, which, in the opinion of such court, should have been taken directly to the Supreme Court of the United States, such court shall certify the case to the Supreme Court of the United States, which shall thereupon have jurisdiction to hear and determine the case to the same extent as if an appeal had been taken directly to that Court.

2. 19 U.S.C. 1304 provides in part:

§ 1304. Marking of imported articles and containers—

(a) Marking of articles.

* * * [E]very article of foreign origin * * * imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article. The Secretary of the Treasury may by regulations—

(1) Determine the character of words and phrases or abbreviations thereof which shall be acceptable as indicating the country of origin * * *;

(2) Require the addition of any other words or symbols which may be appropriate to prevent deception or mistake as to the origin of the article * * *.

* * * * *

(c) Penalties.

If any person shall, with intent to conceal the information given thereby or contained therein, deface, destroy, remove, alter, cover, obscure, or obliterate any mark required under the provi-

sions of this chapter, he shall, upon conviction, be fined not more than $5,000 or imprisoned not more than one year, or both.

3. Administrative Regulation 19 C.F.R. 11.8 provides in part:

MARKING

§ 11.8 *Marking of articles and containers to indicate name of country of origin.* (a) The term "country" as used in section 304, Tariff Act of 1930, as amended [19 U.S.C. 1304], requiring the marking of articles to indicate the country of origin, shall be considered to mean the political entity known as a nation. Colonies, possessions, or protectorates, outside the boundaries of the mother country shall be considered separate countries. * * *

* * * * *

4. Treasury Decision 53210 provides in part:

(T.D. 53210)

Products of Germany, Poland, and Danzig

Tariff status, marking to indicate the name of the country of origin, and customs valuation of products of Germany, Poland, and Danzig

TREASURY DEPARTMENT,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., March 3, 1953.

To Collectors of Customs and Others Concerned:

* * * * *

For the purposes of the value provisions of section 402, Tariff Act of 1930, as amended (19 U.S.C. 1402), the area of the Federal Republic of Germany and the Western Sectors of Berlin shall be treated as one "country"; the area of the Soviet Zone of Germany and the Soviet

Sector of Berlin shall be treated as another "country"; the area of Poland and the areas under the provisional administration of Poland immediately east of the Oder-Neisse line and in East Prussia, as well as the former Free City of Danzig, shall be treated as another "country"; and the area in East Prussia under the provisional administration of the Soviet Union shall be treated as another "country." Insofar as this ruling on value results in any change of practice, it shall be applied to merchandise exported after the date of the publication of this decision in the weekly Treasury Decisions.

Articles manufactured or produced in the Federal Republic of Germany or a Western Sector of Berlin shall continue to be marked to indicate Germany as the "country of origin," but products of the Soviet Zone of Germany, or of the Soviet Sector of Berlin shall be marked to indicate Germany (Soviet occupied) as the "country of origin."

5. Treasury Decision 53281 provides in part:

(T.D. 53281)

Abstracts of unpublished decisions

Summary of unpublished customs decisions

TREASURY DEPARTMENT,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., June 18, 1953.

To Collector of Customs and Others Concerned:

The following abstracts of customs decisions are published for your information and guidance. (133.121)

D. B. STRUBINGER,
Assistant Commissioner of Customs.

* * * * *

(3) T.D. 53210 provides that products of the Soviet Zone of Germany or of the Soviet Sector of Berlin shall be marked to indicate "Germany (Soviet occupied)" as the country of origin. Any of the current markings for products of Russia, namely, "Union of Soviet Socialist Republics," or "U.S.S.R.," or "U.S.S.R. (Russia)," or "Soviet Russia," or "Soviet Union," may be substituted for the word "Soviet" in the parenthesis following Germany in the legend specified in T.D. 53210. Bureau letter to the acting collector of customs, New York, New York, June 9, 1953 (363.22)

QUESTIONS PRESENTED

On the issue of jurisdiction, the questions are:

1. Whether the dismissal of an information based upon the interpretation of an administrative regulation is tantamount to a dismissal based upon the invalidity or construction of the statute upon which the information is founded for the purpose of an appeal under 18 U.S.C. 3731.

2. Whether a motion to dismiss which is essentially a demurrer, but effectively bars further prosecution, is a special plea or motion in bar under 18 U.S.C. 3731.

If the Court should hold that the appeal is properly before it, the questions presented are:

3. Whether administrative regulations which define "country" as the political entity known as a nation, and which require articles imported from East Germany to be marked "Germany/USSR Occupied", require such labeling on imported articles to be maintained until sale to an ultimate purchaser.

4. Whether the administrative regulations in this case were sufficiently definite and certain to be the basis of a criminal prosecution.

STATEMENT

An eleven-count information filed in the United States District Court for the Southern District of New York charged that appellees removed, with intent to conceal the information so set forth, the country-of-origin labels attached to ten violins (counts 1–10) imported into the United States from the Soviet Zone of Germany, after importation but prior to the sale of the violins to an ultimate purchaser (R. 3–4). The eleventh count alleged a conspiracy among the appellees to remove the labels from the violins prior to sale to ultimate purchasers (R. 5–7). It was the theory of the information that the removal of labels bearing the inscription "Germany/USSR Occupied" violated 19 U.S.C. 1304, *supra*, pp. 3–4, and its implementing regulations (*supra*, pp. 4–6).

19 U.S.C. 1304, *supra*, requires that "every article of foreign origin * * * imported into the United States shall be marked" with the "name of the country of origin" to indicate its source to the ultimate purchaser; authorizes the Secretary of the Treasury to issue regulations specifying the wording required; and establishes penalties for altering any required mark. "Country of origin" has been interpreted by the Treasury Department to mean "the political entity known as a nation." 19 C.F.R. § 11.8(a), *supra*, p. 4. A later Treasury Decision, No. 53210, provided that "For the purposes of the value provisions

of section 402, Tariff Act of 1930, as amended (19 U.S.C. 1402)", articles from Western Germany should still be marked as made in Germany, but articles from Eastern Germany should be marked to indicate "Germany [Soviet occupied]." The title of the decision, however, stated that it was applicable to "Tariff status, marking to indicate the name of the country of origin," as well as customs valuation. *Supra,* p. 4.

In dismissing the indictment, the District Court considered these materials and an affidavit (R. 10–11) from defense counsel that appellees had marked the offending violins as "Made in Germany." It concluded that the administrative regulations required different markings on articles from East and West Germany only for the purpose of imposing the proper duty, and not for the purpose of carrying out the marking provisions of 19 U.S.C. 1304 (R. 12–15). It also ruled that, if the Treasury Decision was intended to render illegal appellees' alterations, the regulations were too vague to support a criminal prosecution (R. 15).

On appeal by the government to the Second Circuit, the Court of Appeals held that the District Court's opinion construing the administrative regulations was tantamount to a construction of the statute upon which the information was founded, and that the order of dismissal was thus appealable directly to this Court. It said (R. 27; App., *infra,* p. 24):

> [W]hen Congress used the term "statute" in § 3731 it did so in the broad sense and meant

> to include all that could have the force of law from the exercise of the power which Congress may have granted as part of the statutory scheme.
>
> * * * [A] dismissal based upon a holding that the regulations will not support a prosecution necessarily decides as well that the statute alone, without the regulations, will not support it, * * *.

The Court of Appeals was also of the opinion that the dismissal of the information amounted to an order sustaining a motion in bar, since the effect of the order was to end the cause and exculpate the defendants (R. 27–28, App., *infra,* p. 25). Under 18 U.S.C. 3731, *supra,* p. 2, an order sustaining a plea in bar is appealable directly to this Court without regard to whether or not the order is based upon the construction of a statute.

DISCUSSION

I

JURISDICTION

It is the government's position that the appeal was properly taken to the Court of Appeals under 18 U.S.C. 3731 and should not have been certified to this Court. We think that the dismissal of the information on grounds which involve only an interpretation of the language of a regulation issued under a statute, and not of the statute itself, is not a dismissal based upon the construction or validity of the statute upon which the information is founded, for the purposes of an appeal under 18 U.S.C. 3731. It is further our position that a decision on a motion which alleges that

the information does not charge an offense on its face—the equivalent of a common-law demurrer—is not a decision on a motion in bar within the terms of 18 U.S.C. 3731.

A. *The decision of the District Court did not rest on an interpretation of the statute on which the information was founded.*

The grounds on which the District Court based its opinion were (1) that the regulations requiring a distinction between East and West Germany did not in terms apply to the country-of-origin marking requirements of 19 U.S.C. 1304, *supra*, pp. 3–4, and (2) that, if they were meant to relate to that requirement, they were too vague and indefinite to sustain a criminal prosecution. Both of these grounds go only to the wording of the regulations themselves. They do not in any sense bring into question the power to issue regulations, properly worded, to accomplish the intended result. They do not involve any issue as to the propriety of the regulations under the statute, or of the right to make the acts done by appellees an offense under the statute. In other words, the decision of the District Court did not involve consideration of the wording or meaning of the statute itself; it involved consideration only of the wording or meaning of the regulations.

So far as we have been able to ascertain, it has not been squarely decided by this Court whether or not the order of dismissal in such a case is appealable directly to this Court under 18 U.S.C. 3731. The question is an open one. In our view, the appeal lies to the Court of Appeals in such a case, since we be-

lieve the avenue of direct appeal to the Supreme Court is limited to those cases—not involving a motion in bar—where the District Court has squarely and clearly construed an Act of Congress. Although Treasury regulations have the force of law (see *Currin* v. *Wallace,* 306 U.S. 1, 17; *Didia* v. *United States,* 106 F. 2d 918, 919–920 (C.A. 9)), they are not clothed with the solemnity and dignity of a statute and do not rise to the full level of the legislation of Congress. We think that, under the Criminal Appeals Act (now 18 U.S.C. 3731), they have not been made the concern of the Supreme Court until after consideration by a Court of Appeals.

The provision in the Criminal Appeals Act for direct appeals to this Court has been consistently construed by it "to mean that review can be had here only if a district court's decision was based exclusively upon the invalidity or construction of a statute." *United States* v. *Petrillo,* concurring opinion of Frankfurter, J., 332 U.S. 1, 14, citing *United States* v. *Hastings,* 296 U.S. 188, 192, 194; *United States* v. *Borden Co.,* 308 U.S. 188, 193; *United States* v. *Swift & Co.,* 318 U.S. 442. See also *United States* v. *Jones,* 345 U.S. 377; *United States* v. *Wayne Pump Co.,* 317 U.S. 200, 208. Moreover, the statute has always been narrowly construed to deny direct Supreme Court jurisdiction where it is reasonably possible to do so under the terms of the Act. "The Government's appeal does not open the whole case." *United States* v. *Borden Co., supra.* See also *United States* v. *Hastings,* 296 U.S. 188, 192; *United States* v. *Kissel,* 218 U.S. 601, 606–607; *United States* v. *Keitel,* 211 U.S.

370, 397–399. We therefore do not believe that a regulation can be equated to a statute for the purposes of the Criminal Appeals Act. Courts of Appeals other than the one below have taken jurisdiction of appeals involving the construction and validity of regulations. *United States* v. *Goldberg et al.*, 225 F. 2d 180 (C.A. 8), certificate dismissed, *sub nom. Wisniewski* v. *United States*, 353 U.S. 901; *United States* v. *Gray*, 207 F. 2d 237 (C.A. 9).

Where, as in *United States* v. *Foster*, 233 U.S. 515, there is a question as to whether a regulation is authorized by the statute, a decision that it is not so authorized involves a construction of the statute itself, and falls within the rationale of the Criminal Appeals Act that the validity or construction of an Act of Congress should go directly to this Court for review. But here the issues raised by the government's appeal do not impinge upon the statute which Congress passed (19 U.S.C. 1304); they involve only an interpretation of what the administrative authorities have required, and of the validity of the regulation only, not of the authorizing statute.

B. *The decision of the District Court was not a decision sustaining a motion in bar.*

The original Criminal Appeals Act (Act of March 2, 1907, c. 2564, 34 Stat. 1246) permitted the government to appeal directly to this Court, *inter alia*, "From a decision or judgment * * * sustaining a demurrer to, any indictment, * * * where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded," and also "From the decision or

judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy." This language and this difference in treatment were continued through the course of years. See, for example, 18 U.S.C. (1940 ed.) 682; 18 U.S.C. (1946 ed.) 682.

When the Federal Rules of Criminal Procedure were adopted, Rule 12 abolished special pleas, demurrers, and motions to quash as such, substituting motions to dismiss or to grant appropriate relief. Rule 54(c) provided that the use by Congress in statutes of such language as "demurrer" and "special plea in bar", or their equivalents, should be taken to refer to Rule 12 motions, and the Notes of the Advisory Committee appended to Rule 54 show that there was no intent to affect the government's right to appeal when Rule 12 was promulgated.

Since the adoption of the Federal Rules, the Criminal Appeals Act has been recodified and revised so as to conform to the phraseology of the Rules. 18 U.S.C. 3731, *supra*, pp. 2–3, now permits the government to appeal directly to the Supreme Court:

> From a decision or judgment * * * dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.
>
> * * * * *
>
> From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.

The revisers indicated no intent to work a change in the government's right of appeal, thus preserving the

distinction between those motions to dismiss which, in substance, are motions in bar or special pleas in bar, and those motions to dismiss which are essentially demurrers.[1]

Under the wording of the appeals statute and under the cases, a motion to dismiss which would under the original Act have been called a demurrer is appealable directly to this Court only if it is "based upon the invalidity or construction of the statute * * *." *United States* v. *Nixon,* 235 U.S. 231, 233–236; *United States* v. *Foster,* 233 U.S. 515, 521–523; *United States* v. *Birdsall,* 233 U.S. 223, 227–230; *United States* v. *George,* 228 U.S. 14, 16–17; *United States* v. *Grimaud,* 220 U.S. 506, 510, 514. An order sustaining what was formerly called a special plea in bar, however, is directly appealable to this Court without regard to whether or not it is based upon a construction of the statute. *United States* v. *Oppenheimer,* 242 U.S. 85, 86.

The Court of Appeals below expressed the view that the order here was one sustaining a motion in bar because, if upheld, it would effectively bar any further prosecution. But any order holding a statute invalid or ruling that the criminal statute did not cover the specific acts charged would always, necessarily, bar a future prosecution, if sustained. If that was what was meant by the term "special plea in bar", as

[1] *United States* v. *Hark,* 320 U.S. 531, shows that the term "motion in bar" is directly traceable to the phrase "special plea in bar", which appeared in the original Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246, and its successors.

used in the Criminal Appeals Act when it was initially enacted, the first provision of the Criminal Appeals Act—*i.e.*, the first paragraph quoted *supra*, p. 13—would have been unnecessary. At the time the Criminal Appeals Act was first enacted, there was no provision at all for appeals by the government to the Court of Appeals. The only orders sustaining demurrers which were appealable at all were those involving the validity or construction of the statute which, as noted, would, if sustained, bar a future action. Thus, the framers of the Criminal Appeals Act must have intended to cover different subjects when they provided for appeals from orders sustaining demurrers where a statute was involved, and also provided in the same statute for appeals from orders sustaining special pleas in bar.

The distinction between a demurrer and a special plea in bar was well-known at common law. The demurrer was based on the face of the pleading, and accepted, for the purpose of the decision, the facts alleged, questioning only their legal validity to state an offense. See Shipman, *Common-Law Pleading* (3d ed.), p. 28. It raised no matter not disclosed by the information or indictment, not judicially known, or not legally presumed to be true. Black's Law Dictionary (4th ed.), p. 520. A special plea in bar, on the other hand, was usually a plea in confession and avoidance. It did not question that an offense was charged, but set up special affirmative matter which would bar prosecution for that offense, *e.g.*, the statute of limita-

tions,[2] immunity,[3] or *res judicata*.[4] Shipman, *Common-Law Pleading* (3d ed.), pp. 30, 336–337, 382–383.

As the cases show, the material question is not how the pleading is styled, but whether it alleged *new* matter which would, if sustained, completely bar the action. The fact that a decision on a motion to dismiss effectively and permanently defeats a prosecution does not, in itself, make that pleading a special plea in bar. See *United States* v. *Halsey, Stuart & Co., Inc.*, 296 U.S. 451. "[T]he quality of an act depends upon its circumstances, the quality of the plea depends upon its *contents*. * * * The statute uses technical words, 'a special plea in bar', and we see no reason for not taking them in their technical sense." *United States* v. *Storrs*, 272 U.S. 652, 654 (emphasis added). As was said in *Carroll* v. *United States*, 354 U.S. 394, 406, in a somewhat different context:

> [I]n a limited sense, form *is* substance with respect to ascertaining the existence of appellate jurisdiction. While it is always necessary to categorize a situation realistically, to place a given order according to its real effect, it remains true that the categories themselves were defined by the Congress in terms of form.

Appellee's motion to dismiss did not set out new affirmative grounds which would bar an offense even though an offense was properly charged; appellees challenged the information as not setting forth an offense under the regulations. The decision of the Dis-

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[2] *United States* v. *Goldman*, 277 U.S. 229, 236–237.
[3] *United States* v. *Murdock*, 284 U.S. 141, 147.
[4] *United States* v. *Oppenheimer*, 242 U.S. 85, 86.

trict Court was that no offense was charged, in part because the regulations were not sufficiently clear to create an offense of the character charged. The motion to dismiss was therefore the equivalent of a demurrer and the decision sustaining it was appealable to this Court only if based solely on a construction of the criminal statute on which the information was founded.[5] In Part A, *supra,* pp. 10–12, we have shown that that is not this case.

II

THE MERITS

If the Court should deem the case properly before it, the government will contend that the District Court erred in holding that the Treasury regulations do not clearly require articles imported from East Germany to be marked as made in East Germany, prior to their sale to ultimate purchasers, for the purposes of 19 U.S.C. 1304, which provides that imported articles must be marked with the name of their country of origin and that the marking must be maintained until

[5] The court below accepted, in amplification of the facts set forth in the information, statements in appellees' affidavits to the effect that they had labeled the violins "Made in Germany" after importation and before sale to ultimate purchasers, but only because they "considered all of Germany as one nation" (R. 10–11). This contention—that the appropriate regulations did not make it an offense to mark an article imported from East Germany as "Made in Germany" in any connection other than tariff status and customs valuation—went to the validity of the information as stating an offense, and was still, therefore, a demurrer. A decision on agreed facts in amplification of a pleading is considered equivalent to one on a motion to dismiss the pleading itself. See *United States* v. *Lem Hoy,* 330 U.S. 724, 725.

the ultimate sale of the article. 19 C.F.R. 11.8, *supra*, p. 4, defines "country", as used in 19 U.S.C. 1304, to mean the political entity known as a nation. This alone should indicate that items imported from East and West Germany must be separately marked, since the United States has treated the Federal Republic of Germany as a separate political entity at least since the signing and ratification of the agreement with the government of West Germany.

The District Court held that Treasury Decision No. 53210, *supra*, pp. 4–5, providing that "For the purposes of the value provisions of section 402, Tariff Act of 1930, as amended (19 U.S.C. 1402)," articles from Western Germany should still be marked as made in Germany, but articles from Eastern Germany should be marked to indicate "Germany [Soviet occupied]," was intended to implement only 19 U.S.C. 1402, and not 19 U.S.C. 1304, and that the distinction therefore need not be maintained after the payment of proper duties. We think, however, that Treasury Decision No. 53210 is directed to (1) the rate of duty, whether reduced or full, (2) the value provisions of 19 U.S.C. 1402, where appraisal is required, and (3) the marking provisions of 19 U.S.C. 1304, which are intended to protect the ultimate consumer and help in the detection of customs frauds.

Even if it is conceded that the regulations could be clearer, it is plain that 19 U.S.C. 1304(e) punishes anyone who removes a marking or labeling "with intent to conceal the information given thereby or contained therein, * * *." These violins were originally marked to show that they were made in East

Germany and it would be open to the government to prove at the trial that appellees intended to conceal that information when they relabeled the instruments. The regulations cannot be said on their face to be so vague as not to establish the requirement that articles imported from East Germany be marked so as to be distinguishable from articles made in Western Germany. *Boyce Motor Lines* v. *United States*, 342 U.S. 337.

CONCLUSION

It is respectfully submitted that the Court should return this case to the Court of Appeals for the Second Circuit, which has jurisdiction over this appeal.

J. LEE RANKIN,
Solicitor General.
MALCOLM ANDERSON,
Assistant Attorney General.
BEATRICE ROSENBERG,
EUGENE L. GRIMM,
Attorneys.

FEBRUARY 1959.

APPENDIX

UNITED STATES OF AMERICA, APPELLANT

v.

BERNARD MERSKY, IRVING WEINSTEIN, AND MERSON MUSICAL PRODUCTS CORP., APPELLEES

No. 96, Docket 25193

United States Court of Appeals, Second Circuit

Argued Oct. 7, 1958

Decided Nov. 6, 1958

On Certification of Appeal Dec. 8, 1958

Before CLARK, Chief Judge, and MEDINA and LUMBARD, Circuit Judges.

LUMBARD, Circuit Judge.

We must refuse to hear the government's appeal from the district court's dismissal before trial of an information charging the defendants with improperly removing the labels on goods imported from the Soviet Zone of Germany, because it seems to us that the appeal may be taken only to the Supreme Court by reason of 18 U.S.C. § 3731 (1952). Accordingly, under the terms of the statute, and following our precedent in *United States* v. *Zisblatt*, 2 Cir., 1949, 172 F. 2d 740, we will certify the case to the Supreme Court if the government so requests.

Section 3731 provides that the government may appeal directly to the Supreme Court in two classes of criminal cases which are here relevant:

> From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.
>
> * * * * *
>
> From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.

Where appeal may be taken to the Supreme Court the same statute expressly provides that it may not be taken to a court of appeals:

> An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:
>
> From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof *except where a direct appeal to the Supreme Court of the United States is provided by this section.* (Emphasis added.)

Our conclusion from § 3731 that the government's appeal here lies only to the Supreme Court rests on two grounds. The first is that, as the district court's dismissal of the information rests on its interpretation of a regulation, it is tantamount to being "based upon the invalidity or construction of the statute upon which the * * * information is founded," and appeals from such dismissals may be taken only to the Supreme Court. The second ground is that the effect of Judge Noonan's decision was to sustain a "motion in bar" and that the express provisions of the controlling statute therefore take the appeal to the Supreme Court.

The first ten counts of the eleven count information charge violations of 19 U.S.C.A. § 1304(e), 46 Stat.

687, as amended, 52 Stat. 1077 (1938) [1] by the unlawful alteration, between August 1956 and March 1957 of the required country of origin markings on ten violins. The eleventh count charges conspiracy to violate the same subsection. The defendants moved to dismiss the information for failure to state facts sufficient to constitute an offense against the United States.

Section 1304(e) forbids wilful alterations, for the purpose of concealment, of the marking of the "country of origin" on imported articles required in subsection 1304(a).[2] Subparts (1) and (2) of that subsection vest in the Secretary of the Treasury the power to issue regulations to designate acceptable markings, and to require the addition of words "to prevent deception or mistake as to the origin of the article * * *" Pursuant to this power, the Secretary issued three Treasury Decisions. The first, T.D. 51527 (August 28, 1946), provided that imported articles from any of the Allied Zones of occupied Germany could properly be marked "Germany." The second, T.D. 53210 (March 3, 1953), superseded T.D. 51527 and required that articles from the Soviet Zone be so marked, but the defendants urge that T.D. 51527 was superseded for the purpose of customs valuation only, rather than for all purposes. The third, T.D. 53281

---

[1] Section 1304(e)—"If any person shall, with intent to conceal the information given thereby or contained therein, deface, destroy, remove, alter, cover, obscure, or obliterate any mark required under the provisions of this chapter, he shall, upon conviction, be fined not more than $5,000 or imprisoned not more than one year, or both."

[2] Section 1304(a)—"* * * every article of foreign origin * * * imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article * * * will permit in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article. * * *"

(June 18, 1953), is relied on by the government to establish that T.D. 51527 had been superseded for all purposes.

The information alleged that in wilful violation of § 1304(e) the defendants, who bought from importers and sold to retailers, removed the "Germany/USSR Occupied" label from the violins; defendants' affidavit apparently admits that they customarily substituted the label "Made in Germany." Judge Noonan's dismissal of the information appears to have rested on two alternative grounds both of which the government questions on appeal: Judge Noonan held that either the regulations, properly construed, do not render illegal the defendants' alterations of the markings, or, alternatively, if the alterations were rendered criminal, the regulations are too vague to sustain a criminal prosecution.

First, it seems to us that the dismissal of an information based upon a regulation, or regulations, is comprehended within the scope of the words "construction of the statute upon which the * * * information is founded." It is true that there has been no previous ruling on the precise question presented here: Whether appeal from a dismissal is exclusively for the Supreme Court when it is based in the alternative upon a holding that the regulation as construed is inapplicable, or upon a construction which renders it too vague to sustain the imposition of criminal sanctions. But in *United States* v. *Foster,* 1914, 233 U.S. 515, 34 S. Ct. 666, 58 L. Ed. 1074, the Supreme Court accepted jurisdiction because the district court had dismissed an indictment—based in part on a regulation of the Postmaster General—on the ground that the regulation was directly in conflict with what it held to be the proper "construction of the statute" involved.

We see no reason to distinguish such dismissals from those in which the court looked to what some officer of the government has done under authority which Congress expressly delegated in order to make possible the enforcement of a statute, and not to what Congress itself has written.

Regarding such statutes and regulations there is usually no difference in the penalties which are imposed. The government's need for an authoritative ruling from the highest court may, and usually would, be equally as pressing, and it was to provide such ruling that the Act was passed.[3] See Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States, § 176 (Wolfson & Kurland, ed. 1951). In short, when Congress used the term "statute" in § 3731 it did so in the broad sense and meant to include all that could have the force of law from the exercise of the power which Congress may have granted as part of the statutory scheme.

Moreover, since a dismissal based upon a holding that the regulations will not support a prosecution necessarily decides as well that the statute alone, without the regulations, will not support it, insistence upon a distinction between statute and regulation for

[3] It is no answer that the court of appeals could provide the government with such a ruling where only a regulation is in question. If an appeal such as this would ever have been within the Supreme Court's exclusive jurisdiction it is now, since that Court's jurisdiction remained undiminished when jurisdiction over matters not appealable to it was first vested in the courts of appeals in 1942. Compare 34 Stat. 1246 (1907), with 56 Stat. 271 (1942); see H. Rept. 2052, April 28, 1942, 77th Cong., 2d Sess. Before 1942 to have held that there was a distinction between statute and regulation for purposes of appeal would have made dismissals based on the latter wholly unappealable, and would have defeated the remedial purpose of the statute.

purposes of appeal would force the government to elect whether to appeal the construction of the regulations to the court of appeals, or whether to appeal the construction of the statute to the Supreme Court. The alternative to such an election would be the simultaneous prosecution of appeals in both courts. We cannot find that the Congress intended to limit the remedial usefulness of the statute by such an unworkable distinction in the absence of an express purpose to do so.

In any event, Judge Noonan's dismissal of the information amounts to "sustaining a motion in bar." Of course we look to the substance of the defendants' motion and what it sought to accomplish rather than its mere form. See e.g. *United States* v. *Thompson,* 1920, 251 U.S. 407, 412, 40 S. Ct. 289, 64 L. Ed. 333; *United States* v. *Oppenheimer,* 1916, 242 U.S. 85, 86, 37 S. Ct. 68, 61 L. Ed. 161; *United States* v. *Barber,* 1911, 219 U.S. 72, 78, 31 S. Ct. 209, 55 L. Ed. 99. If to sustain the motion will "end the cause and exculpate the defendants" then the motion is "in bar." *United States* v. *Hark,* 1944, 320 U.S. 531, 536, 64 S. Ct. 359, 362, 88 L. Ed. 290; see also *United States* v. *Oppenheimer, supra,* 242 U.S. at pages 87–88, 37 S. Ct. at page 69. As the defendants have not been put in jeopardy, and since, on either of the grounds given by Judge Noonan for the dismissal, the defendants will be exculpated if the district court decision stands, the appeal is from a decision which in effect sustained a motion in bar and only the Supreme Court may hear it.

For these reasons the appeal will be certified to the Supreme Court if within thirty days the government requests that we do so; otherwise the appeal will be dismissed.

On Certification of Appeal

PER CURIAM.

This cause having come on to be heard upon an appeal taken herein by the United States of America and it appearing to the court that the said appeal, pursuant to the provisions of Title 18, Section 3731, United States Code, should have been taken directly to the Supreme Court of the United States,

And the government having requested certification of the appeal to the Supreme Court of the United States subsequent to the filing of our opinion on November 6, 1958.

Now therefore, this court hereby certifies this case to the said Supreme Court.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

C 155–43

NOONAN, *D. J.*

The defendants herein have moved:

(1) to dismiss the information against them on the ground that it does not state facts sufficient to constitute an offense against the United States.

(2) to permit the defendants to inspect and/or photograph the violins mentioned in that information; and

(3) for a Bill of Particulars.

Since dismissal of the information would obviate the need for determination of the latter two points, we turn directly to that subject.

The first ten counts of the information charge the defendants with violations of Title 19 U.S.C. Sec. 1304; the remaining count charges them with conspiracy to violate that section. The statute involved is known as the Tariff Act of 1930 (as amended).

The pertinent portions of that section of Title 19 (Customs Duties) read as follows:

> * * * every article of foreign origin * * * imported into the United States shall be marked * * * in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article.

The section then goes on to authorize the Secretary of the Treasury to issue regulations determining the wording of the mark required, and concludes with a penal provision for altering any mark required by the Act.

Pursuant to that authority, the Secretary promulgated certain regulations.

The defendants contend that they have not violated the statute because the violins were marked "Made in Germany". The government contends that they should have been marked "Germany/USSR Occupied", or some other marking designed to indicate that the violins were from Eastern as distinguished from Western Germany.

19 C.F.R. Sec. 11.8, dealing with marking recites in part:

> (a) The term "country" as used in Sec. 304, Tariff Act of 1930, as amended, requiring the marking of Articles to indicate the Country of origin, shall be considered to mean the political entity known as a nation. Colonies, possessions or protectorates, outside the boundaries of the mother country shall be considered separate countries * * *.

In addition thereto the Secretary of the Treasury issued on August 28, 1946, Treasury Decision #51527 which began as follows:

> For the purposes of the marking provisions of the Tariff Act of 1930, as amended, Ger-

> many shall be considered the country of origin of articles manufactured or produced in all parts of the German area subject to the authority of the Allied Control Commission and the United States, British, Soviet and French Zone Commanders, regardless of the country from which exported.

The Treasury decision then goes on to cover certain matters not material to this issue, and then concludes:

> The use of additional words to indicate the particular zone of origin, for example, "Made in Germany-U.S. Zone," is permissible.

The government relies on two subsequently issued Treasury Decisions ##53210 and 53281.

Treasury Decision #53210 provides that "For the purposes of the value provisions of section 402, Tariff Act of 1930, as amended (19 U.S.C. 1402)", articles from Western Germany should still be marked as made in Germany, but articles from Eastern Germany should be marked to indicate "Germany [Soviet occupied]".

Treasury Decision #53281 provides alternate markings to that mentioned in #53210.

The purpose of markings pursuant to 19 U.S.C. Sec. 1304 is to enable the ultimate purchaser to know where the goods were produced and to be able to buy or refuse to buy if such marking influences his will. *U.S. v. Friedlaender & Co.*, 27 C.C.P.A. 297.

Certainly in these days, the indication of which part of Germany originated the violins might well influence the determination of the ultimate buyer.

Nonetheless, it is the opinion of this court from a reading of the Treasury Decisions ##53210 and 53281, in their entirety, that such Treasury Decisions appear to have been issued primarily to establish markings for purposes of the differences in the duties applicable to articles from the two parts of Germany

and, while it appears to this court that it is not unreasonable to view those Treasury Decisions as indicating that such distinction should be complied with for all purposes, the court does not believe that such intent is manifested in a manner sufficiently clear and unambiguous to justify a criminal prosecution thereon.

As the defendants note, the Secretary could very easily have indicated that East and West Germany should be considered two separate countries for all purposes within the jurisdiction of the Treasury Department, not just for the purposes of the value provisions of Sec. 402.

Since penal provisions are to be very narrowly construed, and since the court believes that ambiguity exists in the Secretary's regulations, ambiguity must be construed in favor of the defendants.

Accordingly, it is the decision of this court that the information against the defendants should be dismissed.

Settle order.

Dated, New York, N.Y.
March 26, 1958

G. NOONAN
U.S.D.J.

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IN THE

Supreme Court of the United States

October Term, 1959

No. [redacted] 31

UNITED STATES OF AMERICA,
Appellant,

v.

BERNARD MERSKY, IRVING WEINSTEIN, and MERSON MUSICAL PRODUCTS CORP.,
Appellees.

ON CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM IN REPLY TO MEMORANDUM FOR THE UNITED STATES REGARDING JURISDICTION

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It is respectfully submitted that this "appeal" should be dismissed in the interest of orderly procedure and justice, because it was not taken in conformity to the rules of this Court and the provisions of 18 U. S. C. 3731. Also, the questions involved in the decision made in the District Court are unsubstantial and relatively simple and are clearly set forth in the opinion of that court.

This case presents the phenomenon of an appellant who does not invoke the jurisdiction of this Court but argues

that the case be sent back to the Court of Appeals for determination.

The government was apparently of the opinion, at the beginning, that the proper procedure here would be to file a petition for a writ of certiorari and, accordingly, obtained an order from Mr. Justice Harlan extending the time to file such petition until January 5th, 1959. For some unknown reason that idea was abandoned and instead the government later filed "a memorandum • • • regarding jurisdiction". Neither the rules of this Court nor the provisions of 18 U. S. C. 3731 sanction the means by which this case is brought before this Court.

After the publication of the opinion of the Court of Appeals, the government submitted a memorandum to that court which began as follows:

> "In its decision of Nov. 6, 1958, the Court stated that 'the appeal will be certified to the Supreme Court if within thirty days the government request that we do so, otherwise the appeal will be dismissed'. It is respectfully suggested that the transfer should be on the Court's own motion rather than on the request of the government since 18 U. S. C. 3731 under which the appeal was taken to this Court provides • • •."

Thereupon, the Court of Appeals issued the certification stating, *inter alia*, as follows:

> "And the government having requested certification of the appeal to the Supreme Court of the United States subsequent to the filing of our opinion on November 6, 1958,
>
> Now, therefore, this Court hereby certifies this case to the said Supreme Court."

It is clear that the Court of Appeals did not certify the case on its own motion. It is equally clear that the government did not request certification. Since the government abandoned the idea of proceeding by a petition for a writ of certiorari and did not appeal directly from the District Court to this Court, the question is: What is there before this Court to decide?

In any event, an appeal would not now be timely.

On the question of jurisdiction of this Court *vis a vis* the Court of Appeals the government is attempting to limit the word statute as used in 18 U. S. C. 3731 to an act of Congress exclusively. It is argued that since the District Court construed the provisions of Treasury Decision 53210 and not those of 19 U. S. C. 1304 the appeal was properly taken to the Court of Appeals. That argument completely ignores the plain language of 19 U. S. C. 1304 where Congress expressly authorized the Secretary of the Treasury to provide for addition of words and phrases indicating the country of origin of imported articles. In effect this language authorizes the Secretary of the Treasury to define country of origin. Consequently, a construction of a regulation issued by Treasury dealing with the definition of country of origin is in essence a construction of the statute on which the regulation is based.

It is, accordingly, respectfully submitted that the decision of the Court of Appeals to the effect that the appeal should have been taken directly to this Court is correct for the reasons fully set forth in its opinion (R. 22-28).

The decision of the District Court is likewise correct as well as just (R. 12-15). For some unknown reason the government omitted from its memorandum Treasury Decision 51527 issued on August 28, 1946, which specifically provided that merchandise imported from the Eastern

Zone of Germany should be marked "Made in Germany". The appellees, a small distributing firm, has been buying violins from an importer and selling them to dealers, not ultimate purchasers. In accordance with the custom in the trade they removed the label bearing the name of the foreign exporter and importer substituting therefore the labels bearing their name with a stamp "Made in Germany". Until March 3, 1953, it was legal to so label the merchandise imported from East Germony when Treasury Decision 53210 was promulgated. It is the contention of the government that this regulation, although clearly intended "for purposes of value * * * " made it a crime to label the articles "Made in Germany" instead of "Made in Germany/USSR Occupied".

It would have been a simple matter for the Treasury Department to have stated that for "all purposes" the marking provisions were changed and not merely for "purposes of value". For all we know, Treasury may have had a motive other than a legal one for the use of language of limitation. Certainly, it cannot be said that there is no ambiguity in the provisions of that regulation. Bearing in mind the cardinal principles of construction of regulations where a crime is charged, the conclusion must be that the District Court decision was sound and just.

In its memorandum the government also claims that the question of whether an appeal from a decision involving the construction of an administrative regulation is tantamount to a construction of a statute is an open one. I respectfully suggest that, taking this case as an example, this kind of a question needs no determination by an Appellate Court and the government should be content with the opinion of the District Judge that the regulation needs amending and so advise the Secretary of the Treasury.

It would have been fair, just and proper to have changed the regulation rather than to go through the appeals herein.

The question presented by the government on page 6 of its memorandum marked "3", is a distortion of the real issue which is: Whether the language in Treasury Decision 53210 is clear enough to make it a crime to do what was theretofore perfectly legal to do by virtue of the provisions of Treasury Decision 51527.

Accordingly, it is respectfully submitted that the appeal be dismissed or in the alternative the decision of the District Court be affirmed.

March 1959.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 31

UNITED STATES OF AMERICA, APPELLANT

v.

BERNARD MERSKY, IRVING WEINSTEIN, AND MERSON MUSICAL PRODUCTS CORP.

ON CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Appeals (R. 15-19) to the effect that it did not have jurisdiction over the appeal is reported at 261 F. 2d 40. The opinion of the District Court dismissing the information (R. 9-11) is not reported.

JURISDICTION

On March 26, 1958, the District Court dismissed the information on the ground that a Treasury Decision requiring articles imported from Eastern Ger-

many to be marked "Germany [Soviet occupied]" did not require such marking for the purpose of 19 U.S.C. 1304. On appeal by the government, the Court of Appeals concluded that the appeal should have been taken to this Court in the first instance, since, in its view, the construction of the Treasury regulation was a construction of a statute under 18 U.S.C. 3731 and, in any event, the order sustaining the motion to dismiss was an order sustaining a motion in bar (R. 15-19). It therefore certified the appeal to this Court (R. 23-24). On March 30, 1959, this Court postponed further consideration of the question of jurisdiction until the hearing of the case on the merits (R. 25). It is the government's position that the case was correctly appealed to the Court of Appeals under 18 U.S.C. 3731, and that the appeal should not have been certified to this Court.

QUESTIONS PRESENTED

On the issue of jurisdiction, the questions are:

1. Whether the dismissal of an information based upon the interpretation of an administrative regulation is a dismissal based upon the invalidity or construction of the statute upon which the information is founded, for the purposes of direct appeal to this Court under 18 U.S.C. 3731.

2. Whether a motion to dismiss which is essentially a demurrer, but effectively bars further prosecution, is a special plea or motion in bar under 18 U.S.C. 3731.

If the Court should hold that the appeal is properly before it, the questions presented are:

3. Whether Treasury Department administrative regulations providing that articles imported from East Germany should be marked "Germany USSR Occupied" require such labeling on imported articles to be maintained until sale to an ultimate purchaser.

4. Whether these administrative regulations were sufficiently definite and certain to be the basis of a criminal prosecution.

STATUTES AND ADMINISTRATIVE REGULATIONS INVOLVED

1. 18 U.S.C. 3731 provides in part:

> An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:
>
> From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.
>
> * * * *
>
> From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.
>
> * * * *
>
> If an appeal shall be taken pursuant to this section to any court of appeals, which, in the opinion of such court, should have been taken directly to the Supreme Court of the United States, such court shall certify the case to the Supreme Court of the United States, which shall

thereupon have jurisdiction to hear and determine the case to the same extent as if an appeal had been taken directly to that Court.

2. 19 U.S.C. 1304 provides in part:

§ 1304. Marking of imported articles and containers—

(a) Marking of articles.

* * * [E]very article of foreign origin * * * imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article. The Secretary of the Treasury may by regulations—

(1) Determine the character of words and phrases or abbreviations thereof which shall be acceptable as indicating the country of origin * * *;

(2) Require the addition of any other words or symbols which may be appropriate to prevent deception or mistake as to the origin of the article * * *.

* * * *

(e) Penalties.

If any person shall, with intent to conceal the information given thereby or contained therein, deface, destroy, remove, alter, cover, obscure, or obliterate any mark required under the provisions of this chapter, he shall, upon conviction, be fined not more than $5,000 or imprisoned not more than one year, or both.

3. Administrative Regulation 19 C.F.R. 11.8 provides in part:

MARKING

§ 11.8 *Marking of articles and containers to indicate name of country of origin.* (a) The term "country" as used in section 304, Tariff Act of 1930, as amended [19 U.S.C. 1304], requiring the marking of articles to indicate the country of origin, shall be considered to mean the political entity known as a nation. Colonies, possessions, or protectorates, outside the boundaries of the mother country shall be considered separate countries. * * *

* * * *

4. Treasury Decision 51527, dated August 28, 1946, provides in part:

For the purposes of the marking provisions of the Tariff Act of 1930, as amended, Germany shall be considered the country of origin of articles manufactured or produced in all parts of the German area subject to the authority of the Allied Control Commission and the United States, British, Soviet, and French zone Commanders, regardless of the country from which exported. * * *

* * * *

The use of additional words to indicate the particular zone of origin, for example "Made in Germany—U.S. Zone," is permissible.

5. Treasury Decision 53210 provides:

(T. D. 53210)

Products of Germany, Poland, and Danzig

Tariff status, marking to indicate the name of the country of origin, and customs valuation of products of Germany, Poland, and Danzig.

TREASURY DEPARTMENT,
OFFICE OF THE COMMISSIONER OF CUSTOMS

Washington, D. C., March 3, 1953.

To Collectors of Customs and Others Concerned:

In accordance with the President's Proclamation 2935 of August 1, 1951 (3 CFR, 1951 Supp., Chap I; T. D. 52788) and Notifications pursuant thereto dated August 1, 1951 (3 CFR, 1951 Supp., Chap. III, Subchap. E; T. D. 52788), and January 17, 1953 (18 F. R. 593; T. D. 53191), products of Poland, the Soviet Zone of Germany, the Soviet Sector of Berlin, or areas in Germany under the provisional administration of the Soviet Union or of Poland, as well as the former Free City of Danzig, entered, or withdrawn from warehouse, for consumption shall not receive reduced rates of duty established pursuant to any trade agreement. Products of the Federal Republic of Germany or of the Western Sectors of Berlin continue to receive most-favored-nation treatment.

For the purposes of the value provisions of section 402, Tariff Act of 1930, as amended (19 U.S.C. 1402), the area of the Federal Republic of Germany and the Western Sectors of Berlin shall be treated as one "country"; the area of the Soviet Zone of Germany and the Soviet Sector of Berlin shall be treated as another "country"; the area of Poland and the areas under the provisional administration of Poland immediately east of the Oder-Neisse line and in East Prussia, as well as the former Free City of Danzig, shall be treated as another "country"; and the area in East Prussia under the provisional administration of the Soviet Union

shall be treated as another "country." Insofar as this ruling on value results in any change of practice, it shall be applied to merchandise exported after the date of the publication of this decision in the weekly Treasury Decisions.

Articles manufactured or produced in the Federal Republic of Germany or a Western Sector of Berlin shall continue to be marked to indicate Germany as the "country of origin," but products of the Soviet Zone of Germany, or of the Soviet Sector of Berlin shall be marked to indicate Germany (Soviet occupied) as the "country of origin."

Articles manufactured or produced in Poland, in an area under the provisional administration of Poland immediately east of the Oder-Neisse line and in East Prussia, or in the former Free City of Danzig shall be marked to indicate Poland as the "country of origin."

Articles manufactured or produced in the area in East Prussia under the provisional administration of the Soviet Union shall be marked to indicate the Union of Soviet Socialist Republics as the "country of origin."

T. D. 51527 and the entries for Germany and Poland in item 3 of Bulletin of Marking Rulings—3 are superseded, except that the markings specified therein for products of the areas in question, or the markings listed above, shall be acceptable on articles arriving in the United States before the expiration of 90 days after the publication of this decision in the weekly Treasury Decisions. (363.22)

FRANK DOW,
Commissioner of Customs.

[Filed with the Division of the Federal Register March 9, 1953, 8:45 a.m.]

6. Treasury Decision 53281 provides in part:

(T. D. 53281)

Abstracts of unpublished decisions

Summary of unpublished customs decisions

TREASURY DEPARTMENT,
OFFICE OF THE COMMISSIONER OF CUSTOMS

Washington, D. C., June 18, 1953.

To Collector of Customs and Others Concerned:

The following abstracts of customs decisions are published for your information and guidance.
(133.121)

D. B. STRUBINGER,
Assistant Commissioner of Customs.

* * * *

(3) T. D. 53210 provides that products of the Soviet Zone of Germany or of the Soviet Sector of Berlin shall be marked to indicate "Germany (Soviet occupied)" as the country of origin. Any of the current markings for products of Russia, namely, "Union of Soviet Socialist Republics," or "U.S.S.R.," or "U.S.S.R. (Russia)," or "Soviet Russia," or "Soviet Union," may be substituted for the word "Soviet" in the parenthesis following Germany in the legend specified in T. D. 53210. Bureau letter to the acting collector of customs, New York, New York, June 9, 1953. (363.22)

STATEMENT

An eleven-count information filed in the United States District Court for the Southern District of New York charged that appellees removed, with in-

tent to conceal the matter set forth on the labels, the country-of-origin labels attached to ten violins (counts 1-10) imported into the United States from the Soviet Zone of Germany, after importation but prior to the sale of the violins to an ultimate purchaser (R. 2-3). The eleventh count alleged a conspiracy among the appellees to remove the labels from the violins prior to sale to ultimate purchasers (R. 4-5). It was the theory of the information that the removal of these labels bearing the inscription "Germany/USSR Occupied" violated 19 U.S.C. 1304, *supra*, p. 4, and its implementing regulations, *supra*, pp. 5-8.

19 U.S.C. 1304, *supra*, requires that "every article of foreign origin * * * imported into the United States shall be marked" with the "name of the country of origin" to indicate its source to the ultimate purchaser; authorizes the Secretary of the Treasury to issue regulations specifying the wording required; and establishes penalties for altering any required mark. "Country of origin" has been interpreted by the Treasury Department to mean "the political entity known as a nation." 19 C.F.R. § 11.8(a), *supra*, p. 5. After World War II, the Treasury Department permitted all goods manufactured in the various zones of Germany to be labeled as originating in Germany. A later Treasury Decision, No. 53210, provided that "For the purposes of the value provisions of section 402, Tariff Act of 1930, as amended (19 U.S.C. 1402)", Western Germany should be treated as one "country" and Eastern Germany should be treated as another country. The title of

the decision, however, stated that it was applicable to "Tariff status, marking to indicate the name of the country of origin," as well as customs valuation. And a separate paragraph of the regulation went on to require that articles made in Western Germany "shall continue to be marked to indicate Germany as the 'country of origin'," but that goods from Eastern Germany "shall be marked to indicate Germany (Soviet occupied) as the 'country of origin' ". *Supra*, pp. 5-7.

In dismissing the information, the District Court considered the statute and these regulations and also an affidavit (R. 7-8) from defense counsel that appellees had marked the offending violins as "Made in Germany." The court concluded that the administrative regulations required different markings on articles from East and West Germany only for the purpose of imposing the proper duty, and not for the purpose of carrying out the marking provisions of 19 U.S.C. 1304, *supra*. It also ruled that, if the Treasury Decision was intended to render illegal appellees' alterations of the label, the regulations were too vague to support a criminal prosecution (R. 11).

On appeal by the government to the Second Circuit, the Court of Appeals held that the District Court's opinion construing the administrative regulations was tantamount to a construction of the statute upon which the information was founded, and that the order of dismissal was thus appealable directly to this Court under 18 U.S.C. 3731. It said (R. 18-19):

> [W]hen Congress used the term "statute" in § 3731 it did so in the broad sense and meant to include all that could have the force of law from the exercise of the power which Congress may have granted as part of the statutory scheme.
>
> * * * [A] dismissal based upon a holding that the regulations will not support a prosecution necessarily decides as well that the statute alone, without the regulations, will not support it, * * *.

The Court of Appeals was also of the opinion that the dismissal of the information amounted to an order sustaining a motion in bar, since the effect of the order was to end the cause and exculpate the defendants (R. 19).

SUMMARY OF ARGUMENT

I

On the question of jurisdiction it is the government's position that the appeal was properly taken to the Court of Appeals under 18 U.S.C. 3731, *supra*, pp. 3-4, and that it should not have been certified to this Court. We think that the dismissal of the information on grounds involving only an interpretation of the language of the Treasury regulation, and not an interpretation of the statute under which the regulation was issued, is not a dismissal based upon the construction or validity of the statute upon which the information is founded, for the purposes of an appeal under 18 U.S.C. 3731. It is also our position that a decision on a motion which is the equivalent of a common-law demurrer is not a decision on a

motion or plea in bar, within the terms of 18 U.S.C. 3731.

A. So far as we have been able to ascertain, it has not been squarely decided by this Court whether or not an order of dismissal in a criminal case involving only the construction of an administrative regulation is appealable directly to this Court under 18 U.S.C. 3731. We believe, however, that the avenue of direct appeal to this Court is limited by the criminal appeals statute to those cases where the District Court has directly and clearly construed an Act of Congress.

1. The District Court construed only the Treasury regulation in this case, since it based its opinion on the grounds that (1) the regulation requiring a distinction between East and West Germany did not in terms apply to the country-of-origin marking requirements of 19 U.S.C. 1304, *supra*, p. 4, and (2) if the regulation was meant to relate to that requirement, it was too vague and indefinite to sustain a criminal prosecution. Both of these grounds go only to the wording of the Treasury regulation itself. They do not bring into question the Treasury's power under the customs marking statute (19 U.S.C. 1304) to issue regulations to make the acts done by appellees an offense under that statute. The statute was referred to by the District Court only to show the existence of legislation requiring country-of-origin marking.

2. Although Treasury regulations have the force of law, they are not statutes or legislation. Ever since the decision in *The Brig Aurora* v. *United*

States, 7 Cranch 382, this Court has recognized that Congress may authorize executive officers to make rules and regulations in connection with administering the laws governing their departments. Nonetheless, it has always been agreed that the power so delegated by Congress is not—and cannot be—exclusively legislative.

The government's business has become more complex and grants of regulatory power by Congress more frequent, but the status of administrative regulations as subordinate and inferior to the laws of Congress has been consistently maintained. Only Congress may impose a criminal penalty for the violation of a regulation. Only Congress may declare the policy as to what type of conduct shall be punished, or establish criteria to govern administrative regulations. And every administrative regulation or order must in the end find its justification within the permissive ambit of the statute which is said to authorize it. For these reasons, administrative regulations cannot be automatically equated to the expressed will of Congress, and considerations pertinent to the particular piece of legislation using the term "statute" or "act" must be given considerable weight in determining whether those words cover regulations as well as congressional enactments.

3. The provision in the Criminal Appeals Act for direct appeals to this Court has always been narrowly construed by it to limit review to those cases where the district court's decision was based exclusively upon the invalidity or construction of a statute, and to deny direct Supreme Court jurisdiction when it

is reasonably possible to do so under the terms of the Act. Thus, an appeal will not be allowed where the district court has construed the statute but has also rested its decision upon the independent ground of a defect in pleading, or where views as to both the sufficiency of the pleading and the validity or construction of the statute are interwoven in the lower court's decision. Review has also been declined where the district court's decision was so vague that it was impossible to determine whether or not a construction of the statute was the only basis for the ruling. In other words, this Court has limited the Criminal Appeals Act to its literal terms.

The same rationale which has led this Court strictly to construe "invalidity or construction of the statute" suggests that the term "statute" in 18 U.S.C. 3731 should also be read literally to mean an Act of Congress and not its by-product. Within their field regulations may be "little laws" in practical effect, but it is only the solemn act of Congress itself which is "the statute upon which the indictment or information is founded."

The issues raised by the government's appeal in this case do not impinge upon the customs marking statute which Congress passed (19 U.S.C. 1304); their resolution will not in any way depend upon the legislative grant of authority to the Treasury. They involve only an interpretation of what the Treasury authorities have required. For this reason, the decision of the district court was not a construction of the statute on which the information was founded,

and therefore not a decision to be directly reviewed by this Court.

B. The original Criminal Appeals Act permitted the government to appeal directly to this Court from a decision sustaining a demurrer or a plea in abatement only if the decision was based on the invalidity or construction of a statute. But the government was also permitted to appeal directly to this Court "From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy," without regard to whether or not the decision sustaining the special plea in bar was based upon the invalidity or construction of the underlying statute. *United States* v. *Oppenheimer*, 242 U.S. 85, 86. Since the time when the original Appeals Act was passed, special pleas, demurrers, and motions to quash, as such, were abolished by Rule 12, F.R. Crim. P., which substituted motions to dismiss or to grant appropriate relief. Although this Rule applied to the Criminal Appeals Act, among others, the notes appended to the Federal Rules of Criminal Procedure make it clear that there was no intent to change the government's right to appeal. Later, the language of the Criminal Appeals Act was modified to conform to the Rules—again, without intent to work a change in the government's right to appeal. The revisors thus preserved the distinction between those motions to dismiss which in substance are motions or special pleas in bar, and those motions to dismiss which are essentially demurrers.

The Court of Appeals believed that the order here was one sustaining a motion in bar because, if up-

held, it would effectively bar any further prosecution. But any order holding a statute invalid or ruling that the criminal statute did not cover the specific acts charged would always, necessarily, bar a future prosecution, if sustained. If that was what was meant by the term "special plea in bar" as used in the Criminal Appeals Act when it was initially enacted, the first provision of the Act—permitting a direct appeal from orders sustaining demurrers when the order was based upon the invalidity or construction of a statute—would have been unnecessary. The framers of the Act must have intended to cover different subjects when they provided for appeals from orders sustaining demurrers only where a statute was involved, but permitted appeals from orders sustaining special pleas in bar whether or not the underlying statute was involved.

The distinction between a demurrer and a special plea in bar was well-known at common law. The demurrer was based on the face of the pleading and accepted, for the purpose of the decision, the facts alleged, questioning only their legal validity as stating an offense. A special plea in bar, on the other hand, was usually a plea in confession and avoidance, setting up special affirmative matter which would bar prosecution for that offense, *e.g.*, the statute of limitations, immunity, *res judicata*, or revocation of a statute. In short, a special plea in bar is a pleading which alleges *new* matter which, if sustained, *in itself* completely bars the action. The fact that a decision on a motion to dismiss may happen, effectively and permanently, to defeat a prosecution

because of extrinsic circumstances is not alone enough to make that pleading a special plea in bar.

In this case appellees' motion to dismiss did not set out new affirmative grounds which would bar prosecution, even though an offense was properly charged: rather, appellees challenged the information as not setting forth an offense under the regulations. The motion to dismiss was therefore the equivalent of a demurrer and not of a special plea in bar.

In sum, the decision of the District Court was not a decision sustaining a motion or plea in bar, nor was it based solely on the construction or invalidity of a statute. Accordingly, there is no basis for direct review by this Court.

II

19 U.S.C. 1304, *supra*, p. 4, requires that imported articles be marked with their country of origin, and that the marking be maintained until sale to an ultimate purchaser. The District Court was clear that the administrative regulations in this case required that, for the purposes of customs valuation, imported articles from East Germany must be marked to indicate Soviet dominance in that area. The issue on the merits is whether or not these regulations, properly read, also implement Section 1304 by requiring that this distinctive marking must be maintained until the articles reach the hands of the ultimate purchaser. We think that they do.

A. The marking statute expresses a Congressional aim to insure that all imported articles are clearly marked so as to indicate to the ultimate purchaser

their country of origin. In 1937, the Secretary of the Treasury used the authority to issue regulations given him by this statute and defined "country" as the political entity known as a nation, but directed that possessions or protectorates were to be treated as separate countries.

Treasury Decision 51527 (*supra*, p. 5), which was published in 1946, provided that articles imported from all four military occupation zones in Germany were to be considered as made in Germany for the purposes of 19 U.S.C. 1304. Recognizing as it did that German sovereignty was temporarily in abeyance, this regulation did not require that the precise zone of manufacture be specified. In 1949, however, the three western zones of occupation were fused and the German Federal Republic came into being, which meant that the Russian Zone of Occupation no longer stood on the same footing as the fused areas. In 1951, too, Congress and the President withdrew the reduction in rates of duty which had, until then, been applicable to imports from certain areas dominated by the Soviet Union. Treasury Decision 53210, *supra*, pp. 5-7, the regulation construed by the District Court in this case, came into effect (in 1953) against this background.

Treasury Decision 53210 on its face is intended to deal with the particular problems created by the political status of Germany, Poland, and Danzig, as it bears upon imported goods generally. The title says the regulation deals with "Products of Germany, Poland, and Danzig, Tariff status, marking to indicate the name of the country of origin, and customs

valuation of products of Germany, Poland, and Danzig." The body of the regulation conforms to its title and to the separate subjects mentioned in the title. The first paragraph deals with tariff status. The second paragraph is limited to the valuation to be placed on articles imported from areas dominated by the Soviet Union. Paragraphs 3 through 6 deal exclusively with marking—the subject matter of 19 U.S.C. 1304—and are not limited by the second paragraph. In particular, the third paragraph provides *inter alia*, that products from the Soviet Zone of Germany are to be "marked to indicate Germany (Soviet occupied) as the 'country of origin' ", whereas articles imported from West Germany are to be marked as made in Germany.

Although the District Court read the second paragraph's limitation to valuation for customs purposes into the third paragraph, it was not necessary or desirable to do so. The second and third paragraphs deal with different subjects (value, and marking), serve different purposes (valuation, and informing the public about the origin of imported goods), are purposely framed in different language ("country", and "country of origin"), implement different specific policies of the United States in the import field and different provisions of the customs laws, and ought to be read separately. When so read, the regulation in question requires that articles imported from East Germany be marked "Germany (Soviet occupied)" and that the marking be maintained until sale to an ultimate purchaser.

B. The regulation becomes ambiguous or confusing only under the construction given it by the District Court which disregards its title, its construction, and its language. If properly read as relating to separate subjects (as we suggest, *supra*, p. 19), there is no ambiguity or confusion. Moreover, the statute permits the punishment only of one who alters or destroys a required marking "with intent to conceal the information given thereby or contained therein * * *, *supra*, p. 4. The vice of an indefinite statute is that it places the accused on trial for an offense which the statute or regulation does not define and of which it gives no warning. But where the punishment is imposed only for an act which is intentionally done with the purpose of defeating the aim of the statute, the defendant does not suffer from lack of warning. Beyond that, this regulation has a meaning which is clearly understood and easily applied by persons in the export-import field.

ARGUMENT

I

Jurisdiction:—A Ruling Based on the Interpretation of an Administrative Regulation Is Not A Decision Based Upon the Invalidity or Construction of a Statute, or a Ruling on a Motion or Plea in Bar, Within the Meaning of the Criminal Appeals Statute, 18 U.S.C. 3731.

It is the government's position that the appeal was properly taken to the Court of Appeals under 18 U.S.C. 3731, *supra*, pp. 3-4, and should not have been certified to this Court. We think that the dismissal

of the information on grounds involving only an interpretation of the language of a Treasury regulation issued under a customs statute, and not an interpretation of the statute itself, is not a dismissal based upon the construction or validity of the statute upon which the information is founded, for the purposes of a direct appeal under 18 U.S.C. 3731. It is also our position that a decision on a motion which alleges that the information does not charge an offense on its face—the equivalent of a common-law demurrer—is not a decision on a motion or plea in bar within the terms of 18 U.S.C. 3731.

A. *The decision of the District Court did not rest on an interpretation of the statute on which the information was founded.*

So far as we have been able to ascertain, it has not been squarely decided by this Court whether or not the order of dismissal in a case such as this—where only an administrative regulation is construed—is appealable directly to this Court under the Criminal Appeals Act, 18 U.S.C. 3731. The question appears to be an open one.[1] We believe that the appeal lies to the Court of Appeals in such a case, since the avenue of direct appeal to this Court is limited by the appeals statute to those cases where the District Court has squarely and clearly construed

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[1] In *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337, the government appealed the dismissal of an indictment founded on the violation of an administrative regulation to the court of appeals. There was, however, an independent ground for the district court's decision. See 188 F. 2d 889, 892, footnote 4.

or invalidated an Act of Congress. We think therefore that, under the Criminal Appeals Act, the construction of an administrative regulation has not been made the concern of this Court until after consideration by a Court of Appeals.

1. *The District Court construed only the regulations.*

The grounds on which the District Court based its ruling were (1) that the regulations requiring a distinction between East and West Germany did not in terms apply to the country-of-origin marking requirements of 19 U.S.C. 1304, *supra*, p. 4, and (2) that, if the regulations were meant to relate to that requirement, they were too vague and indefinite to sustain a criminal prosecution. As the District Court phrased it (R. 11), the—

> Treasury Decisions appear to have been issued primarily to establish markings for purposes of the differences in the duties applicable to articles from the two parts of Germany and, while it appears to this court that it is not unreasonable to view those Treasury Decisions as indicating that such distinction should be complied with for all purposes, the court does not believe that such intent is manifested in a manner sufficiently clear and unambiguous to justify a criminal prosecution thereon.

Both of these grounds go only to the wording of the Treasury regulations themselves. They do not in any sense bring into question the power to issue regulations, properly worded, to accomplish the intended result. They do not involve any issue as to

the propriety of the regulations under the statute (19 U.S.C. 1304), or of the right to make the acts done by appellees an offense under that statute. "[T]he Secretary could very easily have indicated that East and West Germany should be considered two separate countries for all purposes within the jurisdiction of the Treasury Department, * * *" (R. 11). In other words, the decision of the District Court did not involve consideration of the wording or meaning of the statute itself; it involved only the wording and meaning of the regulations. The statute was referred to only to show the existence of legislation requiring country-of-origin marking.

2. *Although Treasury regulations have the force of law, they are not statutes or legislation.*

Ever since the decision in *The Brig Aurora* v. *United States*, 7 Cranch 382, this Court has recognized that Congress may authorize the doing of executive acts which, in their effect upon the rights and freedom of men, are closely akin to legislative enactments. Nonetheless, it has always been agreed that the power so delegated by Congress is not—and cannot be—exclusively legislative. "It will not be contended, that congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative. * * * [But] a general provision may be made [by Congress], and power given to those who are to act under such general provisions, to fill up the details." *Wayman* v. *Southard*, 10 Wheat. 1, 42, 43; *Field* v. *Clark*, 143 U.S. 649, 692-694. As this Court put it in *United States* v. *Grimaud*, 220 U.S. 506, 517:

> From the beginning of the Government various acts have been passed conferring upon executive officers power to make rules and regulations—not for the government of their departments, but for administering the laws which did govern. None of these statutes could confer legislative power. But when Congress had legislated and indicated its will, it could give to those who were to act under such general provisions "power to fill up the details" by the establishment of administrative rules and regulations, the violation of which could be punished by fine or imprisonment fixed by Congress, or by penalties fixed by Congress or measured by the injury done.

The government's business has become more complex and grants of regulatory power by Congress more frequent, but the status of administrative regulations as subordinate and inferior to the laws of Congress has been consistently maintained. Only Congress may impose a criminal penalty for the violation of a regulation. *United States* v. *Eaton*, 144 U.S. 677, 688. Only Congress may declare the policy as to what type of conduct shall be punished, or establish under what circumstances or upon what conditions certain acts shall be criminal, or establish criteria to govern or check administrative regulations or acts. *Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 529-542; and see *Kraus & Bros.* v. *United States*, 327 U.S. 614, 620-621. Absent any savings clause, continued prosecution depends upon the continued life of the statute which the prosecution seeks to apply (*United States* v. *Chambers*, 291

U.S. 217, 223), but revocation of the applicable regulation alone does not have the same effect, since it does not alter the basic statute. *United States* v. *Hark*, 320 U.S. 531; *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304. And every administrative regulation or order must in the end find its justification within the permissive ambit of the statute which is said to authorize it.[2]

Although regulations have the force of law within their proper and limited sphere,[3] and are "law[s] of the United States" within the meaning of certain statutes,[4] "they are valid only as subordinate rules."

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[2] *Kent* v. *Dulles*, 357 U.S. 116, 129; *Brannan* v. *Stark*, 342 U.S. 451, 465-466; *United States* v. *Morton Salt Company*, 338 U.S. 632, 647-651; *Lichter* v. *United States*, 334 U.S. 742, 783-786, and cases cited therein; *Singer* v. *United States*, 323 U.S. 338, 345; *Mulford* v. *Smith*, 307 U.S. 38, 48-49; *United States* v. *Rock Royal Co-op.*, 307 U.S. 533, 574; *Currin* v. *Wallace*, 306 U.S. 1, 15-18; *Kay* v. *United States*, 303 U.S. 1, 9; *Manhattan General Equipment Company* v. *Commissioner*, 297 U.S. 129, 134; *Miller* v. *United States*, 294 U.S. 435, 439-440; *United States* v. *Shreveport Grain & Elevator Co.*, 287 U.S. 77, 85; *Hampton & Company* v. *United States*, 276 U.S. 394, 404; *Avent* v. *United States*, 266 U.S. 127, 130; *United States* v. *Janowitz*, 257 U.S. 42, 46; *United States* v. *Morehead*, 243 U.S. 607; *United States* v. *Smull*, 236 U.S. 405, 409, 411; *United States* v. *Antikamnia Chemical Company*, 231 U.S. 654, 666-667; *United States* v. *Grimaud*, 220 U.S. 506, 518; *Union Bridge Co.* v. *United States*, 204 U.S. 364, 377.

[3] *Public Utilities Commission of California* v. *United States*, 355 U.S. 534, 542; *Leslie Miller Inc.* v. *Arkansas*, 352 U.S. 187; *Lilly* v. *Grand Trunk Western Railroad Company*, 317 U.S. 481, 488.

[4] *United States* v. *Howard*, 352 U.S. 212; *Caha* v. *United States*, 152 U.S. 211, 218; see *United States* v. *Hvass*, 355 U.S. 570, 575; *United States* v. *Bailey*, 9 Pet. 238.

Panama Refining Co. v. *Ryan*, 293 U.S. 388, 429.

In short, the administrative regulation must implement the statute but not exceed it; if it molds conduct and controls the activities of men it does so only as a satellite of an Act of Congress. It cannot be automatically equated to the expressed will of the legislative branch. Considerations pertinent to the particular piece of legislation using the term "statute" or "act" must therefore be given considerable weight in determining whether it covers regulations as well as Congressional enactments.

3. *The Criminal Appeals Act should be narrowly construed to apply only to an Act of Congress, not to a regulation.*

(*a*). The provision in the Criminal Appeals Act for direct appeals to this Court has been consistently construed by it "to mean that review can be had here only if a district court's decision was based exclusively upon the invalidity or construction of a statute." *United States* v. *Petrillo*, concurring opinion of Frankfurter, J., 332 U.S. 1, 14, citing *United States* v. *Hastings*, 296 U.S. 188, 192, 194; *United States* v. *Borden Co.*, 308 U.S. 188, and *United States* v. *Swift & Co.*, 318 U.S. 442. See also *United States* v. *Jones*, 345 U.S. 377; *United States* v. *Wayne Pump Co.*, 317 U.S. 200, 208. Moreover, the statute has always been narrowly construed to deny direct Supreme Court jurisdiction where it is reasonably possible to do so under the terms of the Act. "The exceptional right of appeal given to the Government * * * is strictly limited to the instances speci-

fied. * * * The Government's appeal does not open the whole case." *United States* v. *Borden Co.*, *supra*, at 192-193. It "cannot be extended beyond its terms." *United States* v. *Dickinson*, 213 U.S. 92, 103.

Thus, an appeal will not lie in a case where the district court has considered the construction of the statute but has also rested its decision upon the independent ground of a defect in pleading. *United States* v. *Borden Co.*, *supra*, at 193-194; *United States* v. *Hastings*, *supra*, 296 U.S. at 193-194; *United States* v. *Keitel*, 211 U.S. 370, 397-399; see *United States* v. *Beacon Brass Co.*, 344 U.S. 43, 47. If both the sufficiency of a criminal pleading and the validity or construction of the underlying statute were in issue before the district court, and views as to both were interwoven in the court's decision, this Court has held that it has no jurisdiction to entertain the appeal and that it must remand the cause to the appropriate court of appeals. *United States* v. *Jones*, 345 U.S. 377. Review has also been declined in a case where the district court's decision *may* have been put solely on its construction of the statute but that court's ruling was so vague that it was impossible to determine whether or not a construction of the statute was the only basis for the ruling. *United States* v. *Carter*, 231 U.S. 492, 493-495; *United States* v. *Moist*, 231 U.S. 701, 702-703. Similarly, only final judgments which necessarily end the prosecution and meet the other tests of appealability set out above are entitled to direct review. See *Carroll* v. *United States*, 354 U.S. 394.

Moreover, the Court does not reach issues imbedded in the case if those issues were not the basis of decision below. Nor are constitutional issues decided if the case can be resolved on other grounds, and questions of invalidity are invariably postponed until after questions of construction are decided. See, for example, *United States* v. *Auto. Workers*, 352 U.S. 567, 589; *United States* v. *Harriss*, 347 U.S. 612, 617-618; *United States* v. *C.I.O.*, 335 U.S. 106, 110; and *United States* v. *Petrillo*, *supra*, 332 U.S. 1. See generally *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 568. Where the district court has held that a particular statute is not applicable to the indictment and on direct appeal it turns out that the indictment may be sustainable under another statute, this Court in its discretion has remanded the case to the trial court to permit it to consider the statute upon which the indictment is founded. *United States* v. *Malphurs*, 316 U.S. 1, 2-3; *United States* v. *Nixon*, 235 U.S. 231, 233-236.

The sum of the mainstream of decision by this Court is that it has limited the Criminal Appeals Act to its literal terms. The cases show that on direct review the Government is entitled to have answered the question of the invalidity or construction of the statute upon which the prosecution is bottomed, and no other, and then only if that question was the sole basis for the district court's decision. Where there has been any reasonable ground for remanding the case to the appropriate court of appeals as in *Jones*, *supra*, this Court has done so. And premature decisions, or decisions not absolutely

required by the appeals statute, have been avoided.

The same rationale which has led this Court strictly to construe "invalidity or construction of the statute" suggests that the term "statute" in the Criminal Appeals Act should also be read literally to mean an Act of Congress and not its by-product. If only Congress can establish the penalty for violation of a regulation (*United States* v. *Eaton*, *supra*, 144 U.S. 677, 688), declare the policy as to what kind of conduct shall be punished, and establish the standard by which regulations are to be measured (*Schechter Poultry Corp.* v. *United States*, *supra*, 295 U.S. 495; *Panama Refining Company* v. *Ryan*, 293 U.S. 388, 415), then it is only the solemn act of Congress itself which is "the statute upon which the indictment or information is founded". Within their field regulations may be "little laws" in practical effect (Vom Baur, *Federal Administrative Law*, § 490, p. 489), but a literal construction of the word "statute" would best satisfy the logic of the precedents under the Criminal Appeals Act.

(*b*). Courts of appeals other than the one below have taken jurisdiction of appeals involving the construction and validity of regulations. *United States* v. *W. T. Rawleigh Co.* (C.A. 7), decided May 18, 1959; *United States* v. *Goldberg, et al*, 225 F. 2d 180 (C.A. 8); *United States* v. *Gray*, 207 F. 2d 237 (C.A. 9). In *Goldberg*, defendants who were bartenders and tavern owners, were indicted for violating a Treasury regulation which provided, *inter alia*, that the original contents of any container for distilled spirits were not to be increased by the addition

of any substance. It was the theory of the indictments that the defendants had added cheaper tax-paid spirits or water to more expensive spirits. The indictments were dismissed by the district court on the ground that the permissive scope of the regulation, as authorized by the basic statute, was not sufficiently broad to encompass the acts alleged in the indictments. A panel of the Court of Appeals held that "any substance" meant "any substance subject to taxation under the internal revenue laws of the United States" and that, so construed, the regulation was proper. 225 F. 2d at 186. The court accordingly reversed the trial court's dismissal of the indictments and returned the cases for trial. After trial and conviction, the cases were again appealed to the Court of Appeals, this time going to a different panel. That panel certified the following question to this Court:

> Does the phrase "any substance" as employed in 26 C.F.R., Section 175.121, 1952 Cumulative Pocket Supplement, include tax paid distilled spirits?

The Court dismissed the certificate on the ground that the appellate court must reconcile its own internal difficulties regarding the respect to be accorded to a previous decision of a different panel, but it was not suggested that the first panel had no jurisdiction to construe the administrative regulation. *Wisniewski* v. *United States*, 353 U.S. 901-902.

(*c*). Where, as in *United States* v. *Foster*, 233 U.S. 515, there is a question as to whether or not a regulation is authorized by the basic statute, a

trial court ruling that it is not so authorized does involve a construction of the statute itself, and therefore falls within the rationale of the Criminal Appeals Act that the validity or construction of an Act of Congress should go directly to this Court for review. *United States* v. *Hvass, supra*, 355 U.S. 570, 573-574, shows this to be so:

> The District Court dismissed the indictment not because of any deficiency in pleading or procedure but solely because it held that Rule 3 "is not such a law of the United States as was intended by Congress to support an indictment for perjury." It thus dismissed the indictment upon its construction of the federal perjury statute. * * *

But here, as we have shown (*supra*, pp. 22-23), the issues raised by the government's appeal do not impinge upon the customs statute which Congress passed (19 U.S.C. 1304); their resolution will not in any way depend upon the legislative grant of authority. They involve only an interpretation of what the administrative authorities have required, and the constitutional validity of those regulations alone, not the scope or validity of the authorizing statute. For this reason, the decision of the district court was not a construction of the statute on which the information was founded, and therefore not a decision to be directly reviewed by this Court.

B. *The decision of the District Court was not a decision sustaining a motion or plea in bar.*

The original Criminal Appeals Act (Act of March 2, 1907, c. 2564, 34 Stat. 1246) permitted the gov-

ernment to appeal directly to this Court, *inter alia*, "From a decision or judgment * * * sustaining a demurrer to, any indictment, * * * where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded," and also "From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy." This language and this difference in treatment—not confining appealable orders sustaining pleas in bar to decisions based on the invalidity or construction of the underlying statute—were continued through the course of years. See, for example, 18 U.S.C. (1940 ed.) 682; 18 U.S.C. (1946 ed.) 682.

When the Federal Rules of Criminal Procedure were adopted, Rule 12 abolished special pleas, demurrers, and motions to quash as such, substituting motions to dismiss or to grant appropriate relief. Rule 54(c) provided that the use by Congress in statutes of such language as "demurrer" and "special plea in bar", or their equivalents, should be taken to refer to Rule 12 motions, and the Notes of the Advisory Committee appended to Rule 54 show that there was no intent to affect the government's right to appeal when Rule 12 was promulgated.

Since the adoption of the Federal Rules, the Criminal Appeals Act has been recodified and revised so as to conform to the phraseology of the Rules. 18 U.S.C. 3731, *supra*, pp. 3-4, now permits the government to appeal directly to this Court:

> From a decision or judgment * * * dismissing any indictment or information, or any count

> thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.
>
> * * * *
>
> From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.

The revisers indicated no aim to work a change in the government's right of appeal; rather, they preserved the distinction between those motions to dismiss which in substance are motions in bar or special pleas in bar, and those motions to dismiss which are essentially demurrers.[5]

Under the wording of the appeals statute and under the cases, a motion to dismiss which would under the original Criminal Appeals Act have been called a demurrer is appealable directly to this Court only if it is "based upon the invalidity or construction of the statute * * *." *United States* v. *Nixon*, 235 U.S. 231, 233-236; *United States* v. *Foster*, 233 U.S. 515, 521-523; *United States* v. *Birdsall*, 233 U.S. 223, 227-230; *United States* v. *George*, 228 U.S. 14, 16-17; *United States* v. *Grimaud*, 220 U.S. 506, 510, 514. An order sustaining what was formerly called a special plea in bar, however, is directly appealable to this Court without regard to whether or

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[5] *United States* v. *Hark*, *supra*, 320 U.S. 531, shows that the term "motion in bar" is directly traceable to the phrase "special plea in bar", which appeared in the original Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246, and its successors.

not it is based upon a construction of the statute (or its validity). *United States* v. *Oppenheimer*, 242 U.S. 85, 86; *United States* v. *Zisblatt*, 172 F. 2d 740, 742 (C.A. 2).

The Court of Appeals below expressed the view that the order here was one sustaining a motion in bar because, if upheld, it would effectively bar any further prosecution. But any order holding a statute invalid or ruling that the criminal statute did not cover the specific acts charged would always, necessarily, bar a future prosecution, if sustained. If that was what was meant by the term "special plea in bar", as used in the Criminal Appeals Act when it was initially enacted, the first provision of the Act—*i.e.*, the first paragraph quoted *supra*, pp. 32-33—would have been unnecessary. At the time the Criminal Appeals Act was first enacted, there was no provision for appeals by the government to the Court of Appeals. The only orders sustaining demurrers which were appealable at all were those involving the validity or construction of the statute which, as just noted, would (if sustained) bar a future action. Thus, the framers of the Criminal Appeals Act must have intended to cover different subjects when they provided for appeals from orders sustaining demurrers where a statute was involved, and also provided in the same Act for appeals from orders sustaining special pleas in bar (whether or not the underlying statute was involved).

The distinction between a demurrer and a special plea in bar was well-known at common law. The demurrer was based on the face of the pleading, and

accepted, for the purpose of the decision, the facts alleged, questioning only their legal validity as stating an offense. See Shipman, *Common-Law Pleading* (3d ed.), p. 28. It raised no matter not disclosed by the information or indictment, not judicially known, or not legally presumed to be true. Black's Law Dictionary (4th ed.), p. 520. A special plea in bar, on the other hand, was usually a plea in confession and avoidance. It did not question that an offense was charged, but set up special affirmative matter which would bar prosecution for that offense, *e.g.*, the statute of limitations,[6] immunity,[7] res judicata,[8] or revocation of a statute.[9]

As the cases show, the material issue is not how the pleading is styled—as a special plea in bar, demurrer, or plea in abatement—but whether it alleges *new* matter which would, if sustained, *in itself* completely bar the action. See *United States* v. *Halsey, Stuart & Co., Inc.*, 296 U.S. 451-452. The fact that a decision on a motion to dismiss may happen, effectively and permanently, to defeat a prosecution because of extrinsic circumstances is not alone enough to make that pleading a special plea in bar. "[T]he

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[6] *United States* v. *Barber*, 219 U.S. 72, 78; *United States* v. *Goldman*, 277 U.S. 229, 236-237; *United States* v. *Grainger*, 346 U.S. 235, 238-239; see *United States* v. *Smith*, 342 U.S. 225.

[7] *United States* v. *Murdock*, 284 U.S. 141, 147.

[8] *United States* v. *Oppenheimer*, 242 U.S. 85, 86.

[9] *United States* v. *Chambers*, 291 U.S. 217, 223-224; cf. *United States* v. *Hark*, 320 U.S. 531, 535-536.

quality of an act depends upon its circumstances, the quality of the plea depends upon its *contents*. * * * The statute uses technical words, 'a special plea in bar', and we see no reason for not taking them in their technical sense." *United States* v. *Storrs*, 272 U.S. 652, 654 (emphasis added). In *Storrs*, for example, a plea in abatement that the indictment was bad was sustained after the statute of limitations had run. This Court held that the fact that the United States was effectively barred from further prosecution did not change the plea in abatement into a special plea in bar. See *United States* v. *Brodson*, 234 F. 2d 97, 99-100 (C.A. 7).

Conversely, in *United States* v. *Chambers*, *supra*, 291 U.S. 217, 221-222, the defendant, by what he called a plea in abatement, claimed that repeal of the Eighteenth Amendment by the Twenty-first Amendment necessarily rendered inoperative the National Prohibition Act which he had allegedly violated. Since the contents of the pleading showed it to be a special plea in bar, the district court decision sustaining the plea was directly appealable. See also *United States* v. *Barber*, 219 U.S. 72, 78 (statute of limitations raised by what was erroneously called a plea in abatement); and *United States* v. *Thompson*, 251 U.S. 407, 412-413 (motion to quash raising question of whether it is necessary to procure the prior approval of the court wherever a district attorney presents to one grand jury charges which a previous grand jury has ignored; held to be a special plea in bar because the ruling upholding it attempted to impose a bar to the absolute power of the United

States and the grand jury to proceed; the case is explained in *United States* v. *Storrs*, *supra*, 272 U.S. at 654-655).

In this case, appellees' motion to dismiss in the District Court did not set out new affirmative grounds which would bar prosecution, even though an offense was properly charged; rather, appellees challenged the information as not setting forth an offense under the regulations. The decision of the District Court was that no offense was charged, in part because the regulations were not sufficiently clear to create an offense of the character alleged. The motion to dismiss was therefore the equivalent of a demurrer and not of a special plea in bar. As was said in *Carroll* v. *United States*, 354 U.S. 394, 406, in a somewhat different context:

> [I]n a limited sense, form *is* substance with respect to ascertaining the existence of appellate jurisdiction. While it is always necessary to categorize a situation realistically, to place a given order according to its real effect, it remains true that the categories themselves were defined by the Congress in terms of form. * * *

In sum, the decision of the District Court was not a decision sustaining a motion or plea in bar, nor (as shown *supra*, pp. 21-31) was it based solely on the construction or invalidity of the underlying statute. Accordingly, there is no basis for direct review by this Court.[10]

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[10] The court below accepted, in amplification of the facts set forth in the information, statements in appellees' affidavits to the effect that they had labeled the violins "Made

II

The Merits:—The Challenged Regulations Properly Implement 19 U.S.C. 1304, hich Requires That Imported Articles Be Marked To Indicate Their Country of Origin Until Sale to the Ultimate Purchaser, By Establishing a Distinctive Marking for Articles Imported From East Germany.

19 U.S.C. 1304, *supra*, p. 4, requires that imported articles be marked with their country of origin and that the marking be maintained until sale to an ultimate purchaser. The District Court was clear that the administrative regulations in this case did require that, for the purposes of customs valuation, imported articles emanating from East Germany must be marked to indicate Soviet dominance in that area. The issue on the merits is whether or not these regulations, properly read, also implement Section 1304 by requiring that this distinctive marking must be maintained until the articles reach the hands of the ultimate purchaser. As to this, the District Court held that the regulations do not impose any requirement that the original marking be maintained after customs valuation, or, alternatively, that

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in Germany" after importation and before sale to ultimate purchasers, but only because they "considered all of Germany as one nation" (R. 7-8). This contention—that the appropriate regulations did not make it an offense to mark an article imported from East Germany as "Made in Germany" in any connection other than tariff status and customs valuation—went to the validity of the information as stating an offense, and was still, therefore, a demurrer. A decision on agreed facts in amplification of a pleading is equivalent to one on a motion to dismiss the pleading itself. See *United States* v. *Lem Hoy*, 330 U.S. 724, 725.

the regulations were too vague and ambiguous to impose this requirement with certainty. We think the District Court erred on both grounds.

A. *The regulations defining "country" as the political entity known as a nation, and requiring articles imported from East Germany to be marked "Germany/USSR Occupied", clearly implement 19 U.S.C. 1304, which in turn requires such distinctive labeling on imported articles to be maintained until sale to an ultimate purchaser.*

The marking statute, 19 U.S.C. 1304, *supra*, p. 4, expresses a Congressional aim to insure that all imported articles are clearly marked so as to indicate to the ultimate purchaser their country of origin. The purpose of such marking is to enable the purchaser to know where the goods were produced; he is entitled to the information to help him to decide whether he wishes to buy or to refuse to buy. *United States* v. *Friedlaender & Co.*, 27 C.C.P.A. 297, 302. Marking serves a purpose which runs deeper than lessening the chances of "palming-off". Given the equality of all other things—such as quality, color, design, and function—the buyer may yet not desire to give his patronage to the goods of certain countries or areas controlled by certain countries. To insure informed choice, Congress provided that imports were to be marked "in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit *in such manner as to indicate to an ultimate purchaser* * * * the English name of the country of origin of the article", *supra*, p. 4 (emphasis added).

The statute (Section 1304) specifically confers on the Secretary of the Treasury the authority to issue regulations determining the words acceptable as indicating the country of origin and requiring the addition of such words or symbols as may be appropriate to prevent deception or mistake as to the origin of the article (*supra*, p. 4). By an administrative regulation first published in 1937, the Secretary defined the term "country" as used in the statute to mean "the political entity known as a nation." 19 C.F.R. 11.8, *supra*, p. 5. (See 2 F.R. 1569-1570, Aug. 26, 1937; 19 C.F.R. (1st ed. 1938) 9.8; 13 F.R. 8011, Dec. 18, 1948.) At the same time, it was recognized that colonies, possessions, or protectorates outside the boundaries of the mother country do not share the "political entity" of the mother country; the regulation directed that such possessions or protectorates were to be treated as separate countries and their products separately marked.

Shortly after the termination of hostilities in World War II, in 1946, Treasury Decision 51527, *supra*, p. 5, was published. This regulation provided that articles imported from all four of the military occupation zones in Germany were to be considered as made in Germany for the purpose of the statutory marking requirements of 19 U.S.C. 1304. Recognizing that German sovereignty was at that time in abeyance within the traditional limits of the country, and that Germany temporarily did not exist as a separate political entity, the regulation permitted but did not require the use of additional words indicating the specific zone of manufacture.

The political situation was altered between 1946 and 1953. On April 8, 1949, the three Western German Zones of Occupation were merged and the German Federal Republic came into being. TIAS 2066, 63 Stat. 2817-2836. While the agreement which brought about this change was not a definitive treaty of peace, it clearly meant that the Russian Zone of Occupation was no longer viewed as on the same footing with the fused areas. Moreover, in 1951, Congress directed the President to suspend or withdraw any reduction in rates of duty or other concessions which would otherwise be applicable to imports from areas dominated by the Soviet Union. Section 5 of the Trade Agreements Extension Act of 1951, 65 Stat. 73, 19 U.S.C. 1362. To that end, the President issued Proclamation No. 2935, 3 C.F.R., 1949-1953 Comp., pp. 121-122, and Trade Agreement Letter of August 1, 1951, 3 C.F.R., 1949-1953 Comp., p. 1043, which suspended any reduction in rates of duty with respect, *inter alia*, to any article manufactured in the Soviet Zone of Germany and the Soviet Sector of Berlin. These presidential actions were initially implemented by T.D. 52788, which spelled out the rates of duty applicable to products from the Soviet Zone of Germany, but which said nothing about labeling.

Treasury Decision 53210, *supra*, pp. 5-7, the regulation which was construed by the District Court and which is of primary importance here, came into effect on March 9, 1953, against the background we have outlined. This regulation is headed, "Products of Germany, Poland, and Danzig, Tariff status, marking to indicate the name of the country of origin, and

customs valuation of products of Germany, Poland, and Danzig". The title reveals the regulation's purpose to deal with the particular problems created by the political status of "Germany, Poland, and Danzig", as it bears upon imported goods generally. And the title specifically indicates that, as to products from such countries, the regulation deals with "marking to indicate the name of the country of origin", as well as with tariff status and customs valuation.

The body of the regulation conforms to its title. The first paragraph provides that products of Poland, East Germany, East Berlin, and other portions of Germany subject to Polish or Soviet control, such as Prussia, are not to be accorded reduced rates of duty. Products of the Federal Republic of Germany, on the other hand, are to continue to receive "most-favored-nation treatment" (*supra*, p. 6).[11] The second paragraph of the regulation deals with the valuation to be placed on articles imported from areas dominated by the Soviet Union. It directs that

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[11] All articles imported into the United States are subject to full duty unless specifically exempted therefrom, 19 U.S.C. 1001. The imported products in this case (violins) are subject to a compound duty, made up of a specific duty or fee per unit, plus an ad valorem duty. See 19 U.S.C. 1001, par. 1541(b). Determination of the ad valorem portion of a compound duty depends upon two factors:—the customs valuation of the article and the rate of customs duty expressed as a percentage of that value. See *Exporting To The United States*, United States Government Printing Office, 1959, O-479929, p. 6. The regulation here, T.D. 53210, dealt with both factors as well as rules for the marking of imported articles.

"For the purposes of the value provisions of section 402, Tariff Act of 1930, as amended (19 U.S.C. 1402), the area of the Federal Republic of Germany and the Western Sectors of Berlin shall be treated as one 'country'; the area of the Soviet Zone of Germany * * * shall be treated as another 'country'; * * *" (*supra*, pp. 6-7). It was necessary to define "country" for customs valuation purposes, since the "foreign value" (19 U.S.C. 1402(c)) and the "export value" (19 U.S.C. 1402(d)) of an imported article depend in part upon its price in the "country" from which exported.[12]

Paragraphs 3 through 6 of the regulation deal exclusively with marking, and are not limited by the second paragraph, which deals (as we have just pointed out) with valuation for customs purposes. Paragraph 3 is as follows:

> Articles manufactured or produced in the Federal Republic of Germany or a Western Sector of Berlin shall continue to be marked to indicate Germany as the "country of origin", but products of the Soviet Zone of Germany, or of the Soviet Sector of Berlin shall be marked to indicate Germany (Soviet occupied) as the "country of origin".

Paragraph 4 deals with the marking to be placed on products originating in Poland or territory adminis-

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[12] The Customs Simplification Act of 1956, 70 Stat. 943, added a new general valuation section, 19 U.S.C. (Supp. V) 1401a, which also deals (subsection (b)), with export value. Section 1402, which has been designated as the alternative basis for determining value, still takes precedence where applicable.

tered by Poland, paragraph 5 with products originating in that portion of East Prussia administered by Russia, and paragraph 6 rescinded the prior regulation (T.D. 51527, *supra*, p. 3) concerning marking for Germany. Although the district judge read the opening restriction in the second paragraph ("For the purposes of the value provisions of section 402") into the third paragraph, dealing with marking, the fact is that there is no language in the third paragraph, or anywhere in the regulation, suggesting that the third paragraph should be so restricted. Certainly, the paragraph itself does not contain any restriction limiting its applicability to valuation, although the opening of the second paragraph shows that the regulation's draftsmen knew how to incorporate such a restriction had one been intended. See *Benanti* v. *United States*, 355 U.S. 96, 105. Rather, the third paragraph says in plain language that it deals with "marking" to indicate "the country of origin".

It is significant that the third paragraph deals with "marking" and "country of origin"—language clearly traceable to the marking statute, 19 U.S.C. 1304, *supra*, p. 4. So far as we have been able to ascertain, Section 1304 is the only provision of the customs laws which uses the term "marking" with reference to the "country of origin" of imports. 19 U.S.C. 1526 prohibits the importation of goods bearing infringing trade-marks, but this is clearly different. Former 19 U.S.C. 134, repealed August 8, 1953 (67 Stat. 509), required that medicinal preparations be stamped or labeled with the name of the manufac-

turer and the place of manufacture, but did not use the words "mark", "marked", or "marking". Former sections 19 U.S.C. 273 and 274, also repealed in 1953 (67 Stat. 509), required officers of inspection to "brand or otherwise mark" the containers of distilled spirits upon landing, but the sections show (by specifying that the brand was to consist of a number, port of importation, name of the vessel, surname of the master, gallonage, and rate of proof) that the required brand or mark had nothing to do with indicating the country of origin. 19 U.S.C. 467, 468, and 469 state that imported liquors should be placed in a bonded warehouse until the containers are marked and revenue stamps affixed to them, but this marking is related to a revenue purpose and is not used to reveal the country of origin of the liquor.[13] 19 U.S.C. 1001 sets forth the dutiable list of imports, and paragraph 367(b) and (g), and paragraph 368 (b) and (e) thereof require that watches, clocks, and watch and clock movements be marked with the name of the country of manufacture. This special marking requirement is plainly related to valuation, and not to disclosure of the country of origin generally. In short, the third paragraph of the regulation involved here (T.D. 53210) must relate to the marking requirements of Section 1304, and to no other section of the customs laws.

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[13] Of course, imported liquors are also subject to the general marking requirements of Section 1304, and, unless exempt from its provisions by the section's own terms, the liquor's container must be marked to reveal the country of origin.

As we have just shown, the regulation becomes confusing and difficult to understand only when it is read, as the District Court did, without regard to its purpose, as revealed in the title, and without regard to the differing language of the separate parts of the regulation. On the other hand, the third paragraph of the regulation does become meaningless and confusing if the second paragraph's restriction is read into it, as the District Court did. If the District Court is right, then the regulation says (in its second paragraph) that the Federal Republic of Germany is one "country" for the purposes of valuation, but also (in the third paragraph) that it is one "country of origin" for valuation purposes. Since the latter phrase does not appear in the valuation provision (19 U.S.C. 1402), the third paragraph of the regulation is reduced to extraneous and unnecessary language by the District Court's reading; it apparently adds nothing, subtracts nothing, and refers to nothing. Furthermore, paragraph 6 of the challenged regulation (T.D. 53210) rescinds the prior regulation (T.D. 51527, *supra*, p. 5) dealing with marking. If the third paragraph of T.D. 53210 is read as limited to valuation, then there is no regulation (save T.D. 53281, discussed *infra*, p. 47) dealing with marking, and therefore no implementation at all of the marking statute (19 U.S.C. 1304). The general custom regulation, 19 C.F.R. 11.8, *supra*, p. 5) says that "country of origin" means the "political entity known as a nation" of origin, but there is no "political entity" known as Germany at the present time. So if the district judge's construc-

tion is followed, importers of goods from East and West Germany are required by 19 U.S.C. 1304 to mark, but no particular marking is specified by any outstanding regulation.

On this view, there is no help from the later regulation, T.D. 53281, *supra*, p. 8, which states that "T.D. 53210 provides that products of the Soviet Zone of Germany * * * shall be marked to indicate 'Germany (Soviet occupied)' as the country of origin." It goes on to set out authorized alternate markings. But if the restrictions read into T.D. 53210 are also read into T.D. 53281—and the district judge did so (R. 10-11)—then the later regulation is in precisely the same posture as T.D. 53210.

The fact is that the second and third paragraphs of T.D. 53210—the regulation in question here—clearly deal with different subjects (value and marking), serve different purposes (valuation and informing the public), are purposely framed in different language ("country" and "country of origin"), implement different specific policies of the United States in the import field and different provisions of the customs laws, and ought to be read separately. "'[T]here is no canon [of construction] against using common sense in construing laws as saying what they obviously mean.'" *Arroyo* v. *United States*, 359 U.S. 419, 424, quoting from *Roschen* v. *Ward*, 279 U.S. 337, 339. This is equally true of regulations. A regulation which states that it is covering three different topics should be read as covering those three different topics. A regulation dealing with marking to indicate the country of origin should

be read as implementing the only statute (19 U.S.C. 1304) which deals with marking to indicate the country of origin. "[W]e should not read out [of a criminal statute] what as a matter of ordinary English speech is in." *United States* v. *Hood*, 343 U.S. 148, 151. Since the marking statute specifically requires that the prescribed mark remain on the article until sale to the ultimate purchaser, and since the regulation requires a specified mark on products from East Germany, a change in the required mark is, under the statute, a criminal violation when wilfully done.

B. *The regulations are sufficiently definite and certain to be the basis of a criminal prosecution.*

The considerations discussed above (*supra*, pp. 39-48) largely dispose of the alternative basis for the District Court's ruling—that the challenged regulation, T.D. 53210, is not sufficiently clear to support a criminal prosecution for wilfully failing to maintain the distinctive marking on East German products until sale to an ultimate purchaser. The regulation becomes ambiguous only under the construction given it by the District Court—which disregards its title, its construction, and its language. As we have shown, the paragraph of the regulation dealing with marking should be separately read, and when so read it expressly requires that the products of East and West Germany bear different markings. In plain terms, the paragraph informs the reader that the products of the German Federal Republic shall be marked as originating in Germany, while the prod-

ucts of East Germany are to be marked "Germany (Soviet occupied)." The regulation clearly relates to the marking statute, 19 U.S.C. 1304, and it is that statute which requires that the marking be maintained.

Perhaps the third paragraph of T.D. 53210 could have begun with a phrase such as "For the purpose of the marking provisions of 19 U.S.C. 1304," but a statute or regulation does not become invalid because better phraseology is possible. All that is required is that the language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. *United States* v. *Petrillo*, 332 U.S. 1, 8. So measured, the language of the third paragraph of T.D. 53210 does not require the defendant to make as difficult a choice as that involved in many cases under legislation confirmed by this Court.[14]

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[14] E.g. *Roth* v. *United States*, 354 U.S. 476, 491 (statute forbidding the mailing of material that is "obscene, lewd, lascivious, or filthy * * * or other publication of an indecent character."); *United States* v. *Harriss*, 347 U.S. 612 (statute applicable to anyone who solicits or collects money where the "principal purpose" of the person or the principal purpose of the solicitation or collection is to influence legislation by direct communication with legislators); *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337 (regulation requiring the drivers of trucks carrying explosives to avoid "congested" routes "so far as practicable, and, where feasible"); *Kovacs* v. *Cooper*, 336 U.S. 77 (prohibition against "loud and raucous" sound trucks); *United States* v. *Petrillo*, 332 U.S. 1 (statute prohibiting coercion of radio stations to employ persons "in excess of the number of employees needed * * * to perform actual services"); *Screws* v. *United States*, 325 U.S. 91, and *Williams* v. *United States*, 341 U.S.

Moreover, the regulation must be read with subsection (e) of the statute, which permits the punishment only of one who alters or destroys a required marking "with intent to conceal the information given thereby or contained therein, * * *", *supra*, p. 4. This Court has consistently attached great significance to the requirement of *scienter* where a question of certainty is raised. *Boyce Motor Lines, Inc.* v. *United States*, *supra*, 342 U.S. at 342; *Screws* v. *United States*, *supra*, 325 U.S. at 101-103; *United States* v. *Ragen*, 314 U.S. 513, 524; compare *Gorin* v. *United States*, 312 U.S. 19, 27-28; *Omaechevarria* v. *Idaho*, *supra*, 246 U.S. at 348. As was said in *Boyce* (342 U.S. at 342):

> The statute punishes only those who knowingly violate the Regulation. This requirement of the presence of culpable intent as a necessary element of the offense does much to destroy any

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97 (prohibition against depriving any person "of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States"); *Old Dearborn Co.* v. *Seagram Corp.*, 299 U.S. 183 (statute exempting fair trade agreements from operation of other laws only if the fair traded article was in "fair and open" competition with other products); *United States* v. *Wurzbach*, 280 U.S. 396 (no officer or employee of the United States may solicit or receive a "contribution for any political purpose whatever" from any other such officer or employee); *Omaechevarria* v. *Idaho*, 246 U.S. 343 (pasturage of sheep forbidden if it would interfere with the "usual and customary" use of a cattle range); and *Nash* v. *United States*, 229 U.S. 373 (statute forbidding "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations").

force in the argument that application of the Regulation would be so unfair that it must be held invalid.

The vice of an indefinite statute is that it places the accused on trial for an offense which the statute or regulation does not define and of which it gives no warning. But where the punishment is imposed only for an act which is intentionally done with the purpose of defeating the aim of the statute, the defendant does not suffer from lack of warning. Beyond that, we have shown that the regulation in this case has a clear meaning which normal persons—and certainly persons in the import-export business—would understand and have no difficulty in applying.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the case should be remanded to the Court of Appeals. If the merits are reached by this Court, the decision of the District Court should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1959

No. 31

UNITED STATES OF AMERICA,
Appellant,

v.

BERNARD MERSKY, IRVING WEINSTEIN, AND MERSON MUSICAL PRODUCTS CORP.

ON CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE APPELLEES

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BRIEF FOR THE APPELLEES

Questions Presented

On the issue of jurisdiction, the questions are:

1. Whether the Decision of the Court of Appeals was correct in holding that the appeal from the District Court Decision should have been taken directly to this Court under 18 U. S. C. 3731 because it involved the construction of a statute or had the effect of sustaining a motion in bar. Also, whether the government should have brought the issue before this Court by a writ of certiorari.

With respect to the merits of this case the question is:

2. Whether the District Court Decision was correct in dismissing the information on the ground that the marking of the violins in this case "made in Germany" did not violate the provisions of Section 1304 of the Tariff Act of 1930 and the regulations issued thereunder.

Statement

The Appellees, a corporation, and its two officers, dealers —not importers—in musical instruments purchased violins from importers and sold them to other dealers—not ultimate purchasers—(R. 7). The information herein charges that the Appellees removed from 10 violins labels marked "Germany/USSR occupied" in violation of 19 U. S. C. 1304 (R. 2-5).

In support of a motion to dismiss the information, the Appellees asserted that, in line with the practice of the trade, they had put labels on the violins which contained their firm name with a stamp "Made in Germany" (R. 7). The government did not dispute these assertions. The motion was granted on the broad ground that the marking of "made in Germany" sufficiently indicated the "country of origin", in this case, for the purposes of the provisions of Section 1304 of the Tariff Act and the regulations based thereon. There can be no question about the fact that from the date of the enactment of the Tariff Act of 1930 to March 9, 1953, the effective date of T.D. 53210, all of Germany was considered one country and a mark "Made in Germany" on articles imported from the Eastern or Western Sector of Germany was considered compliance with the law and the appropriate regulations.

Upon appeal, the Court of Appeals held that the appeal should have been taken directly to this Court under 18 U. S.

C. 3731, because the Decision of the District Court was based upon the construction of a statute and in any event it had the effect of sustaining a motion in bar. The Court of Appeals decided that the appeal would be dismissed unless the government requests certification of the case to this Court (R. 15-19). The government did not request certification because it disagreed with the opinion of the Court of Appeals but suggested that the Court of Appeals certify the case to this Court on its own motion (R. 20-23). The Court of Appeals construed the government's contention as a request and certified the case to this Court (R. 23-24).

ARGUMENT

I

Jurisdiction: The Court of Appeals correctly held that the District Court decision was based upon the construction of a statute and in any event it had the effect of sustaining a motion in bar within the provision of 18 U. S. C. 3731.

The Court of Appeals in its opinion (R. 15-19) fully sets forth the reasons and the authorities for the holding that the District Court Decision was based upon the construction of a statute and had the effect of sustaining a motion in bar within the provisions of 18 U. S. C. 3731, and that the appeal should therefore have been taken directly to this Court.

There is no question of the status of an administrative regulation vis-a-vis an Act of Congress. Nor, is there any question whether the motion to dismiss was in the nature of a demurrer or a special plea.

The opinion of the Court of Appeals clearly demonstrates the complications which would result from an acceptance of an implication that Congress intended to make a distinction between a statute and a regulation in enacting 18 U. S. C. 3731. That opinion also points out that "of course we look to the substance of the defendants' motion and what it sought to accomplish rather than its mere form". Accordingly, the motion to dismiss was properly held to be one in bar.

Moreover, in the instant case, it is quite clear that a construction of T.D. 53210 of necessity involves a construction of 1304 of the Tariff Act of 1930, and vice versa. The Act punishes an intentional and wilful removal of marks indicating the country of origin. It is assumed that an appropriate substitution would be legal provided it contained the required mark of country of origin. The ultimate definition of the country of origin is contained in the Treasury regulations which are expressly authorized by Congress. It is, therefore, clear that the regulation without the statute has no force while the statute without the regulation is incomplete. Thus, an interpretation or construction of one is in effect a construction of the other. For purposes of construction or interpretation they are indivisible. Furthermore, the Court of Appeals in its opinion also held that if the District Court Decision was not based upon the construction of a statute, it nevertheless had the effect of sustaining a motion in bar from which an appeal lies directly to this Court. The government's distinction between a motion in bar and demurrer has no application to the instant case. The District Court Decision was based not only on the information but on the facts alleged in support of the motion to dismiss. Accordingly, the opinion of the Court of Appeals was correct in holding that the government should have appealed the District Court Decision directly to this Court.

In view of the government's disagreement with the decision of the Court of Appeals, the issue should have been brought to this Court by a writ of certiorari. Apparently, the government at first intended to proceed by a writ of certiorari when it obtained a 30 days extension of time to file the petition. For some unexplained reason that procedure was abandoned in favor of the certification of the case by the Court of Appeals.

II

The merits: The dismissal of the information by the District Court was correct on the ground that the appellees did not violate the provisions of 1304 of the Tariff Act and the regulations issued thereunder.

The District Court did not hold that there is no requirement to maintain markings of the country of origin until sale to ultimate purchasers. That Court held in effect that the marking provisions of 1304 of the Tariff Act of 1930 have a dual purpose: one, to establish values for tariff purposes and custom duties and two, to apprise the ultimate purchasers of the place where the articles originated. It specifically held that the regulation in question (T.D. 53210) was promulgated for its avowed, expressed purpose of establishing different values for the Eastern Sector of Germany from the values heretofore in effect for both sectors, and to accomplish that result there was included in that regulation a provision that the articles be marked accordingly—for that purpose. The District Court further held that if Treasury intended that the marking provisions become effective for the purpose of apprising the public generally, thus making criminal an act which was heretofore legal, that intention was not clearly enough stated to sustain the information in this case.

It is obvious on the face of the information that we are not concerned with any penalties for failure to pay custom duties and, therefore, the value provisions of 402 of the Tariff Act of 1930 are not at all involved here.

Prior to March 9, 1953, the effective date of T.D. 53210, articles imported from both sectors of Germany could legally be marked "Made in Germany" to indicate the country of origin within the provisions of 1304 of the Tariff Act of 1930. That regulation, for the first time, makes a distinction between the Eastern and Western Sectors of Germany as far as imported articles are concerned. It is noteworthy that the specific section stated in T.D. 53210, the crucial regulation, is 402 and nowhere is there any reference to 304 or 1304. To read into that regulation a specific section which was obviously deliberately omitted by its draftsmen would be contrary to the cardinal rule of construction of criminal statutes. Furthermore, the political background on which the government relies for support of its argument that the regulation intended to apply to the provisions of 1304 of the Tariff Act of 1930 only emphasizes the need of the strictest possible construction in this case. A plain reading of the regulation does not exclude the possibility that it was the intention of the draftsmen to change nothing more than the value provisions and to leave the provisions concerning the general public in status quo, even if it meant a failure to recognize that there are two separate Germanies.

On the other hand, if the intention was to impress the public with the fact of two Germanies, it should not be left to implication from an ambiguous regulation. The opinion of the District Court to the effect that there is ambiguity in the regulation should have been sufficient for the appropriate bureau to amend or supplement that regulation so as to clearly express its intention. It would also have been fair and just.

The Appellees, small business men, not importers or exporters, did not intend to violate any laws. They acted in accordance with accepted practices in the trade, wholly ignorant of the alleged implications of a little known regulation. The principle of fair play which is the basis of the rule of strict construction of criminal statutes needs no extensive discussion nor the support of authorities. The District Court Decision was, accordingly, legally sound and just.

CONCLUSION

It is respectfully submitted that the appeal be dismissed or that the decision of the District Court be affirmed.

Respectfully submitted,

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August 1959.